87-1219

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1987

G. & T. TERMINAL PACKAGING CO., INC., and ANTHONY SPINALE,

Petitioners,

-vs-

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit. (Third Circuit No.86-5897)

PETITION FOR WRIT OF CERTIORARI

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35 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Does Federal law preempt common law claims against rail carriers for discriminatory conduct practiced during the period in which the Interstate Commerce Commission, pursuant to the Staggers Rail Act of 1980 (Pub. L. No. 96-448, 94 Stat. 1898), has exempted relevant rail traffic from regulation thereby freeing carriers of traditional common carrier obligations that otherwise prohibit such dscriminatory behavior?

2. Does a rail carrier violate the Interstate Commerce Act, 49 U.S.C. Sec. 10505(e) and 11707(a), which grant shippers the right to file claims for recovery of damages caused by the carrier, if it imposes a discriminatory charge on a shipper in order to nullify such a claim right?

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G. & T. Terminal Packaging Co., Inc. and Anthony Spinale Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (App.A) are reported in 830 F.2d 1230. The District Court opinion (App.D) is reported at 646 F.Supp. 511. Two related opinions of the District Court of September 24, 1984 (App.E) and April 8, 1985 (App.F) are not reported. Interstate Commerce Commission decision #40045, of February 27, 1986 (App.G) is reported in 1 ICC2d. 895.

JURISDICTION

The judgment of the Court of Appeals (App.B) was entered on September 23, 1987. A petition for rehearing was denied October 22, 1987 (App.C). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following sections of the Interstate Commerce Act (ICA) Title 49 of the United States Code, are the relevant statutory provisions involved in this case:

> "1. §10101a.
> In regulating the railroad industry, it is the policy of the United States Government--
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
>
> * * *
>
> (13) to prohibit pedatory pricing and practices, to avoid undue concentrations of market and power and to prohibit unlawful discrimination;
>
> 2. §10103.
> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

3. 10501.
(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11505(b) of this title over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

4. §10505.
(e) No exemption order issued pursuant to this section shall operate to relive any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

5. §10741
(a) A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of Chapter 105 of

this title may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

6. §11707.

(a)(1) A common carrier providing transportation or services subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title and a freight forwarder shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier or freight forwarder and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading.

> The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering ;carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier or freight forwarder. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

STATEMENT OF THE CASE

Petitioner G.&T. Terminal Packaging Co., Inc. ("G.&T.") purchases for resale potatoes grown in Idaho and other western states. G.&T.'s facilities are located at the Hunts Point market in the Bronx (New York City) New

York. G.&T. also maintains a repackaging facility at a separate location in Kingsbridge, Bronx, New York about six miles from Hunts Point. Consolidated Rail Corporation (Conrail) is the only railroad that can provide rail service to G.&T.

In 1980, Congress adopted the Staggers Rail Act, Pub. Law No. 96-448, 94 stat. 1898. Pursuant to Staggers Act authorization, the Interstate Commerce Commission ("ICC") exempted rail transportation of potatoes from agency regulations. 367 I.C.C. 298 (1983). The exemption of potatoes from ICC regulation permitted rail carriers fix unilaterally the freight charges that shippers and receivers had to pay without regulatory review or approval. Rail carriers were given a free hand to charge whatever they chose.

In May 1983, without prior notice or explanation, Conrail created a special freight surcharge payable only by G.&T. and two other companies owned or serviced by

petitioner Spinale at his Kingsbridge and Hunts Point, Bronx, New York locations. (Mr. Sprout, Inc. and Tray Wrap, Inc.) This discriminatory surcharge was not based upon differences in delivery or transportation costs. It was in relation for petitioners' filing damage claims as permitted by 49 USC 11707.

Conrail required connecting western rail carriers to add to the applicable freight charge to all shipments to petitioners an additional charge of $500.00 to $600.00 regardless of the destination point on the Conrail system.

When petitioners protested to Conrail, they were told the discriminatory freight surcharge would be substantially eliminated if petitioners would agree not to file any more damage claims.

Petitioners refused to surrender their Federal guaranteed right to file claims for losses incurred as a result of misconduct of

Conrail or other rail carriers. The practical effect of the freight surcharge and its design and intent has been to essentially nullify Petitioner's ICA claims right by offsetting the value of the claims by the amount of the discriminatory freight surcharge. In 1983, for example, G. & T. received more than 400 freight car loads of Idaho and western potatoes. The discriminatory freight surcharge if applied to shipments for that year alone at a rate of $500.00 per car would have exceeded $200,000.00. (Since the surcharge was not in effect during all of 1983, the above is by way of example only).

Petitioners wrote the chairman of the ICC asking whether that agency continued to exercise jurisdiction over such conduct. The agency was asked to determine whether it had "any remaining jurisdiction with regard to disputes of this nature."

Heber P. Hardy, Director of the Office of Proceedings, who replied for the Chairman, responded that the ICC no longer exercised jurisdiction over such rates, and that any dispute "with Conrail, or other railroads would have to be settled in the courts rather than before the Commission."

This action then was brought by petitioners before the U.S. District Court. Jurisdiction, inter alia, was based upon 28 U.S.C. Section 1331 and 28 U.S.C. 1332.

Petitioners and Conrail filed motions for summary judgment. On September 24, 1984, Judge Harold Ackerman denied petitioners' motion. The court granted Conrail's motion for summary judgment with regard to plaintiffs' claims for relief under 49 U.S.C. Section 10741 and 11707. (App. E)

Judge Ackerman also held that plaintiffs' rights under the common law were not preempted by the Staggers Act amendments

to the ICA and denied Conrail's motion as to petitioners' claims under the common law.

Conrail filed a motion for reargument. On April 8, 1985, Judge Ackerman again denied Conrail's motion. (App.F).

During discovery petitioners obtained information about Conrail's actions leading to the imposition of this special surcharge. Following completion of discovery and a week after the final pretrial of the case, Conrail, without notice to petitioners or the court, on September 27, 1985 filed a petition with the ICC requesting the commencement of a declaratory order proceeding. Conrail sought a declaratory order that all common law remedies with respect to railroad rates and conditions of service were preempted by the ICA.

On March 5, 1986, the ICC issued an interpretative decision. The agency asserted, despite its earlier statement to petitioners, that it retained jurisdiction

over matters exempted under Section 10505 expressing its view that there were no surviving common law causes of action. The ICC denied Conrail's request for the institution of a declaratory proceeding holding that such a proceeding was "unwarranted at this point". (App.G)

On April 25, 1986, Conrail again filed for summary judgment. Petitioners filed a cross-motion to restore its claim for relief pursuant to Section 49 U.S.C. 10741 and 11707.

Shortly before the scheduled hearing, the case was reassigned from Judge Ackerman to the Honorable Alfred J. Lechner, Jr. Petitoners asked for reconsideration noting the pending motions dealt with matters previously ruled upon by Judge Ackerman and requesting Judge Ackerman be permitted to act on the pending motions. This request was denied by the Chief Judge.

Judge Lechner on October 23, 1986, granted Conrail's motion to dismiss G.&T.'s common law claim of rate discrimination and also denied G. & T's motion to restore its claim for relief under the ICA. (App. D).

In a two to one decision, the Court of Appeals upheld the District Court. The panel majority held that the "shippers (e.g. G. & T.) remedy for price discrimination is simple: it can choose to use other means of transportation." (App. A, 13a) This factual conclusion was contrary to the record before the court.

To consumers, there is a great difference between western and eastern potatoes. Eastern potatoes cannot be substituted for Idahoes or other westerns potatoes. The record before the Court of Appeals was clear that most western potatoes are grown in Idaho and that virtually all western potatoes are delivered by rail to all eastern receivers including G. & T. A 1983

U.S.D.A. survey showed that 98% of all Idaho potatoes were delivered to New York by rail. Cost factors rule out alternative modes of transportation.

Any assumption of the panel majority that local or truck delivery potatoes could be substituted for Idahoes was factually incorrect and reflected a lack of understanding of G. & T.'s business. The loss of rail service would mean the loss of G.&T.'s market for Idaho and western potatoes.

The Court of Appeals also failed to accept for purposes of reviewing the grant of Conrail's motion of summary judgment, petitioner's contention that Conrail singled out G.&T. for the imposition of a discriminatory freight surcharge because it had exercised its legal right to file claims for damages.

Conrail did argue its actions were based on legitimate business considerations.

Petitioners, however, disputed such self-serving statements and documented much more nefarious reasons for Conrail's punitive actions against them.

During discovery, it was learned that John Kurt, a Conrail employee, prepared a Conrail report to provide a cost justification for the surcharge. He had been instructed to "solve the problem, get rid of him" meaning Mr. Spinale. The Kurt report also revealed its purpose was to "explore opportunity to embargo traffic to G. & T. Terminal Packaging Co.". Conrail also offered to substantially eliminate the surcharge if G. & T. gave up its right to file claims.

Petitioners' contention, therefore, that Conrail maliciously imposed a discriminatory surcharge to punish G. & T. and to deprive it of its right to seek compensation for damages was an intrical part of the warp and woof of the record before the District Court. The

legality of the surcharge, could not properly be based on a factual conclusion that Conrail had a defensible business reason for its actions. This, however, was the thrust of the panel's decision to uphold Conrail's discriminatory freight surcharge.

The panel majority has sanctified discriminatory freight surcharges against shippers and receivers largely on the view that Texas Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 416 (1907) is controlling. Only this Court can determine whether such an interpretation is correct.

REASONS FOR GRANTING THE WRIT

In a chain of decisions during this century this Court has recognized the special status of common carriers and their obligations to customers under both regulation and the common law. Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92 (1901); Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., supra; Nader v.

Allegheny Airlines, Inc., 426 U.S. 290 (1976); Transcontinental Gas Pipe Line Cop. v. State Oil & Gas Bd., _____ U.S. _____ (54 U.S.L.W. 4114 (Jan. 22, 1986).

To petitioner's knowledge, this court has never found that Federal deregulation of a common carrier such as a railroad has freed such carriers not only from Federal and State regulations but also from common law obligations thereby permitting carriers to impose clearly discriminatory charges.

The implications of such a conclusion are enormous. It means that railroads are no longer common carriers but conventional business enterprises although they are not subject to regulatory laws such as the Federal Trade Laws generally applicable to non-carriers that prohibit discriminatory actions.

Since the railroad was invented more than 150 years ago, their special status as a

common carrier with exclusive franchises carries with it an obligation of fairness. This court repudiated early carrier arguments that would have placed persons dealing with common carriers engaged in interstate commerce absolutely at the mercy of the carriers.

In Western Union Telegraph Co. v. Call Publishing Co., supra at 181 U.S. 99, this court observed:

> "Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges....that principle of equality does forbid any difference in charge which is not based upon a difference in service and, even when based upon difference of service must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in

> the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling. And yet, as we have seen, that is precisely the contention of the telegraph company. It contends that there is no federal common law, and that such has been the ruling of this court; there was no federal statute law at the time applicable to this case, and, as the matter is interstate commerce, wholly removed from state jurisdiction, the conclusion is reached that there is no controlling law, and the question of rights is left entirely to the judgment or whim of the telegraph company." (Emphasis Added)

The opinion goes on to reject such a contention of the carriers as follows:

> "Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in statutes of Congress? We are clearly of the opinion that this cannot be so, and that the principles of the commons law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment." 181 U.S. at 102.

The panel majority in an effort to respond to Judge Aldisert's strong argument against taking the quantum leap to the conclusion that Congress closed the door to all judicial remedies when deregulation set in (App.A), was reluctant to recognize that their holding would leave shippers and receivers without a remedy for price discrimination. It cavalierly insisted petitioners had a remedy saying the "shipper's remedy for price discrimination is simple: it can choose to use other means of transportation". (App.A.)

Obviously, such a "remedy" is no remedy at all. The "right" to stop using rail services hardly is a remedy for unjust carrier discrimination.

This case poses a critically important, as well as a novel issue: Does the Staggers Rail Act of 1980, properly interpreted, intentionally preempt state or federal common law claims against rail carriers for

discriminatory conduct engaged in by these carriers during the period in which the ICC has exempted the relevant rail traffic from regulation? If the common law rights of shippers and receivers against common carriers are unavailable during the time that the ICC has suspended regulatory control of alleged discriminatory conduct of rail carriers, the special obligations of common carriers as evolved through the common law are destroyed, although no compensating protection is available under any system of agency regulation. Freight charges would be left entirely to the judgment or whim of the rail carrier even if obviously unfair or discriminatory.

This court has previously resisted such a result, saying:

> "We should be very loth to hold that in the absence of congressional action there are no restrictions on the power of interstate carriers to charge for their services; and, if there be no law to restrain, the necessary result is that there is no limit to

> the charges they make make and enforce." Western Union Telegraph Co. v. Call Publishing, supra at 95.

The Court of Appeals finds it perfectly permissible to leave all shippers and receivers at the mercy of the carriers. It does so largely based on the conclusion Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., supra., requires such a result.

In Abilene, the issue was whether the ICA also permitted courts to grant relief to a shipper upon a finding that a freight rate charged for an interstate shipment was unreasonable even if the rate had been fixed by the duly published and filed rate sheet and when the rate had not been found to be unreasonable by the ICC. In considering this issue, this court noted that: "It may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in

damages." 204 U.S. at 436. The opinion also notes:

> "That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preferences is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principle purposes of the act." 204 U.S. at 339.

In Abilene, the issue was not whether carriers should be free to engage in "unjust discrimination" but whether regulatory and judicial remedies co-existed and this Court held that Congress did not intend to preserve two possibly inconsistent remedies for unjust discrimination.

In the name of Abilene, but not in its spirit, the Court of Appeals holds that Congress intended rail carrier customers to have neither a regulatory nor a judicial remedy for unjust discrimination. We ask this Court to decide whether Congress in the Staggers Act and this court in Abilene sanctioned such a result.

The Court of Appeals failed to recognize there is no regulatory scheme since deregulation by the ICC. The discriminatory freight surcharge in this case was not fixed pursuant to a regulatory process but was imposed at the whim of the carrier. The deregulatory action taken by the ICC which remains in effect today precludes any review before the ICC to protest the illegality or inequity of the carrier's actions.

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), re-examined the meaning and intent of Abilene with regard to the existence of common law remedies in the case of tortious behavior by air common carriers. In Nader, the carrier raised a similar argument that such remedies were inconsistent with the jurisdiction of the Civil Aeronautics Board (CAB). The Federal Aviation Act of 1958, contains language similar to that set forth in 49 U.S.C. 10103. That Court of Appeals also relied on Texas &

Pac. Ry. Co. v. Abilene Cotton Oil Co., supra, and held that the CAB's cease and desist power eliminated private remedies for common law torts arising from unfair or deceptive practices by regulated carriers. It stayed judicial consideration until the CAB completed ongoing rulemaking proceedings. This court came to the contrary conclusion:

> "In this case, unlike Abilene, we are not not faced with an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies. In Abilene the carrier, if subject to both agency and court sanctions, would be put in an untenable position when agency and court disagreed on the reasonableness of the rate. The carrier could not abide by the rate filed with the Commission, as required by statute, and also comply with the court's determination that the rate was excessive. The conflict between the court's common-law authority and the agency's right-making power was direct and unambiguous. The court in the present case, in contrast, is not called upon to substitute its judgment for the agency's on the reasonableness of a rate - or, indeed, on the reasonableness of any carrier practice." 426 U.S. 299.

Judge Aldisert's dissenting opinion points out that in this case there is:

> "...no irreconcilable conflict between a common law remedy here and the ICC's jurisdiction as provided by Congress. Because the common law action is available only when the ICC surrenders its jurisdiction over the relevant traffic by granting an exemption, the court's will not substitute their judgment for that of the agency's on the reasonableness of any carrier practice. As contemplated by the savings clause of the Staggers Act, 49 U.S.C. Section 10103, a common law remedy may co-exist with the role of the ICC in regulating rail transportation." (App.A)

In Nader, no conflict was found to exist even though the CAB was considering proposals to regulate the conduct upon which Mr. Nader based his common law action. Here the Court of Appeals found a conflict because the ICC has determined there is no need to regulate the carrier. The panel majority concluded that judicial review of tortious behavior would consitute "case-by-case judicial regulation of rates". (App.A)

The panel majority opinion obscures the critical distinction between "regulation" and judicial review of tortious behavior. The essence of regulation is prior restraint with a system for filing and approving tariffs and enforcement initially through an administrative body. A tort remedy, such as is provided at common law, is an after the fact examination of a carrier's conduct to make certain that fundamental concepts of fairness and justice have not been violated. It is not before the fact regulation.

The Court of Appeals' decision runs squarely counter the reasoning in Western Union Telegraph Co. v. Call Publishing, supra; Texas & Pac. Ry. Co. v. Abilene Cotton Oil Col, supra, and Nader v. Allegheny Airlines, supra. Its decision drastically affects all shippers and receivers. On an issue of such paramount importance, the resolution of this heretofore unresolved

issue by this Court is a matter of urgency and necessity.

The Court of Appeals also rejected Petitioners' contention that Conrail's use of a punitive surcharge deprived G.&T. of its legal right to pursue claims under the Federal ICA. G.&T. argues that Conrail intended to strip it of its right to file claims by misuse of its freight charging power and that such action was contrary, not only to common law, but as to Federal statutory law.

The potential for rail carrier abuse is extremely high if Conrail legally can eviscerate the value of shippers' and receivers' claims rights by simply imposing excessive and unjustifiable "surcharges". Even if a shipper or receiver retains the technical "right" to seek claims payment, it has little meaning should carrier have an unreviewable power to neutralize the value of

claim payments through the use of manipulative rates. Such an indirect action to achieve an illegal goal is barred by law. Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955). This issue also warrants the attention of this court.

That these issues are novel, difficult and far from final resolution. On the District Court level Judge Ackerman and Judge Lechner came to diametrically opposite conclusions and the panel of the Court of Appeals divided two to one on the self-same issues.

These differences are well summarized by Judge Aldisert:

> "What divides this court is a straightforward disagreement. We are not fencing with glancing blows. Our divergent views meet a single controlling issue head on: Does federal law preempt state common law claims against rail carriers for discriminatory conduct practiced during the period in which the Interestate Commerce Commission, pursuant to the Staggers Rail Act of 1980, has exempted relevant rail traffic from regulation? The majority says

> common law remedies are preempted in these circumstances. I say they are not. (App.A)

At some point, this Court will resolve finally whether Congress intended to unleash the railroads to such an extent they may engage in unrestrained discriminatory behavior. This issue is posed starkly in this case by Conrail's actions and it is ripe for decision.

CONCLUSION

On the issue of discrimination, Professor Louis B. Schwartz observed:

> "...discrimination between customers violates some deeply held principles of fairness or equity. Much of the opposition to anti-discrimination legislation found among economists stems from an indifference to the "non-economic" and "non-quantifiable" considerations of "justice". Antitrust and Regulatory Alternatives, Schwartz and Flynn, 5th Edition (Foundation Press, N.Y. 1977), p. 868.

We entreat this Court not to be indifferent to the "non-quantifiable" considerations of justice and to decide whether the price the public must pay to

correct over regulation by the ICC is unconscionable carrier behavior that runs counter to "deeply held principles of fairness or equity".

Respectfully Submitted,
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On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit. (Third Circuit No.86-5897)

APPENDIX FOR PETITIONERS

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5897

G. & T. TERMINAL PACKAGING CO., INC.
and ANTHONY SPINALE,
Appellants

v.

CONSOLIDATED RAIL CORPORATION,

On Appeal from the United State District
Court for the District
of New Jersey-Newark
(D.C. Civil No. 84-1173)

Argued: June 22, 1987
Before: GIBBONS, Chief Judge,
WEIS and ALDISERT, Circuit Judges
(Filed September 23, 1987)

Appendix A

OPINION OF THE COURT

GIBBONS, Chief Judge:

Several rail shippers[1] of agricultural commodities appeal from a summary judgment in favor of Consolidated Rail Corp. (Conrail) in their action set aside rates fixed by Conrail for their shipments. The shippers' appeal poses the question whether the Congressional decision in the Railroad Revitalization and Regulatory Reform Act of 1976 (4 R Act), Pub. L. No. 94-210, 90 Stat. 31, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1898, in favor of deregulation of most rail tariffs should be deemed to have overruled the holding in Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) that courts may not entertain common law challenges to rates established pursuant to the Interest Commerce Act. 49 U.S.C. §§ 10101-11917. The district court

held that the Abilene Cotton Oil rule survives the 4 R Act and the Staggers Rail Act. We affirm.

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1. The shippers are G & T Terminal Packaging Co., Inc., Mr. Sprout, Inc., Tray Wrap, Inc., and Anthony Spinale. The shippers are located at Hunts Point Market or Kingsbridge, Bronx, New York. They purchase for resale potatoes or brussel sprouts grown in the western United States.

I.

On April 10, 1980 rates for rail transportation of potatoes and other agricultural commodities were exempted from regulation under the Interstate Commerce Act. Ex Parte No. 436 (Sub No. 2), Rail Commodities (filed March 24, 1980), 45 Fed. Reg. 204 (1980). The Plaintiff shippers are served by Conrail, which delivers to them at Hunts Point or Kingbridge rail car shipments of potatoes and other commodities received from western connecting carriers. Apparently because the plaintiff shippers filed numerous claims against Conrail for loss or damage, Conrail informed all western connecting carriers in May or June of 1983 that it was imposing a surcharge of $500 or $600 per car (depending on the point of origin) on all rail car shipments to them. A Conrail internal memorandum noted that one of the plaintiff shippers had filed claims for amounts exceeding Conrail's revenues. Faced

with the surcharges of $500 or $600 per car, the shippers on September 30, 1983 wrote a letter to the Chairman of the Interstate Commerce Commission, contending that the rates were discriminatory and unreasonable and inquiring whether the Commission retained any jurisdiction over them. Herbert Hardy, Director of the Office of Proceedings, directed by ICC Chairman Taylor, responded:

> The Interstate Commerce Commission no longer exercises jurisdiction over the rates charged by the railroads for the movement of the commodities covered by the exemption or over the practices engaged in by the railroads in the course of transporting them. Because your client and its affiliates appear to deal only in products covered by the agricultural commodities exemption, any dispute they may have with Conrail, or other railroads would have to be settled

in the courts rather than before the Commission.

After receiving Mr. Hardy's letter, the shippers filed in the district court a seven count complaint alleging that the new rates violated the Interstate Commerce Act, 49 U.S.C. § 10101-11917, the common law, the antitrust laws, and the United States Constitution. In essence the common law claims assert that the decision by Conrail to impose a surcharge on shipments to the plaintiff shippers was made in retaliation for the shippers pursuing valid claims for past damages and delays, and discriminated against them in comparison with shippers similarly situated. The district judge to whom the case was first assigned granted Conrail's motion for summary judgment on the Interstate Commerce Act and constitutional claims. The antitrust claims were later dismissed with prejudice by stipulation.

Conrail's motion for summary judgment on the shippers' common law claims was initially denied.

In September, 1985, Conrail filed a petition with the Interstate Commerce Commission, pursuant to 49 U.S.C. § 11701, requesting the commencement of a declaratory order proceeding to the effect that the commission retained jurisdiction over rates exempted pursuant to 49 U.S.C. § 10505, and that such jurisdiction was exclusive. On March 5, 1986 the Commission, responding to the Conrail petition, stated that, despite Mr. Hardy's letter, 2/ it retained jurisdiction over exempted rates and that such unexercised jurisdiction preempted common law causes of action challenging such rates. Consolidated Rail Corporation -- Declaratory Order -- Exemption, 1 ICC 2d 895 (Feb. 27, 1987).

Armed with the Commissioner's ruling, and with the intervening decision in

Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi, _____ U.S. _____, 106 S. Ct. 709 (1986), Conrail renewed its motion for summary judgment.

In Transcontinental the Supreme Court considered whether the states could impose conditions on the first sale of natural gas which, by direct statutory exemption, was placed beyond regulation by the Federal Energy Regulatory Commission (FERC). Prior to 1978 regulation by FERC preempted any state regulation. See Northern Natural Gas Co. v. State Corporation Comm'n of Kansas, 372 U.S. 84 (1963). In the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3351, Congress substantially restricted FERC's regulatory authority. The Transcontinental Court noted that a "decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive

force as a decision to regulate". 106 S. Ct. at 717 (citations omitted). The Court refused to accept the argument that Congress "in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC." Id.

A Second district judge to whom the renewed Conrail motion for summary judgment was assigned, found both the Commission's declaratory ruling and the Transcontinental Court's reasoning to be persuasive and granted summary judgment. The order granting summary judgment on the shipper's common law claims resulted in an appealable order because it disposed of all the remaining claims. See Fed.R.Civ.P. 54(b). This appeal followed. Since summary judgment was entered on all claims not voluntarily dismissed, our review is plenary.

II.

The shippers contend that the court erred in dismissing their statutory claims, in holding their common law claims to be preempted, and in dismissing their constitutional law claims. We address these contentions in that order.

A.

The shippers point out that under the Interstate Commerce Act a holder of a receipt or bill of lading is entitled to recover for the actual loss or injury to the property caused by the carrier. 49 U.S.C. § 11707(a)(1). They urge, as well, that this carrier's responsibility for loss or damage survives deregulation. See First Pennsylvania Bank v. Eastern Airlines, Inc., 731 F.2d 1113 (3d Cir. 1984). From these unquestionably sound premises the shippers urge the conclusion that an attempt to increase rates in an amount sufficient to cover the cost of processing, defending, and

paying damage claims must be illegal. This conclusion, however, does not follow from the premises. The summary judgment record establishes that some of the plaintiff shippers have filed and are litigating loss or damage claims against Conrail, pursuant to 49 U.S.C. § 11707, in appropriate state courts. Recovery in those pending actions, or in any subsequently filed, will not be affected by the tariffs here challenged. The shippers' statutory argument would be equally applicable to rates fixed by the Commission prior to deregulation, or to rates fixed under the 4 R Act and Staggers Rail Act for dominant non-exempt traffic. Yet the shippers cite no authority -- statutory, regulatory, or judicial -- for the proposition that carrier liability under section 11707 is not a cost which may be taken into account in fixing rates. The absence of such authority suggests the obvious: section 11707 prohibits rail

carriers from relieving themselves of the cost of paying loss or damage claims; it simply does not deal with what costs may be taken in account in determining rates. Indeed the 4 R Act, as amended by the Staggers Act, states specifically that "[n]othing in this subsection or section 11707...shall...give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707...." 49 U.S.C. §10505(e). Under the 4 R Act and the Staggers Act, levels or rates of service are to be determined primarily by competition in the marketplace for transportation services. Thus we agree with the district judges, both of whom rejected the claim that the challenged rates violated any relevant federal statute.

B.

On the motion for summary judgment we are obliged to accept as true the shippers'

contention that the surcharges imposed on their shipments resulted in tariffs higher than those being charged to some of their competitors. We accept, arguendo, their legal contention that at common law there were remedies against common carriers for discrimination in rates among shippers. After the enactment of the Interstate Commerce Act, however, rail shippers were no longer subject to such remedies. See Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (no common law actions challenging rates established under the Interstate Commerce Act). See also Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (state common law remedy imposing service requirements preempted by Interstate Commerce Act). From the time Abilene Cotton Oil was decided to date, no case has permitted a shipper to challenge a freight rate in a common law action. The shippers, however, discern in

the deregulation scheme of the 4 R Act and Staggers Act a Congressional intention to restore the common law authority of the state or federal courts, at least in cases in which the Commission has found commodities to be exempt.

Prior to 1976, railroads were required to file tariffs with the Commission and interested parties were able to challenge these rates. 49 U.S.C.A. §§ 1(5), 15 (1959) (amended 1976, repealed 1980). The authority of the Commission to exempt rates from challenge has its roots in the 4 R Act, which had a declared purpose of "permit[ting] railroads greater freedom to raise or lower rates for rail services in competitive markets." 45 U.S.C. § 801(b)(3)(1982). The exemption authority was a principal component of the Staggers Act, which furthered the policy of "allow[ing], to the maximum extent possible, competition and the demand for services to establish reasonable rates for

transportation by rail." 49 U.S.C. § 10101a(1) (1982). But while both the 4 R Act and Staggers Act decreased the Commissioner's role with respect to rate-making, neither their text nor their legislative history suggests a Congressional intention to resurrect common law remedies moribund since 1907. Indeed the Staggers Act expressly condified the holding of Abilene Cotton Oil, adding to the Interstate Commerce Act the provision:

> The jurisdiction of the Commission...over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practice of such carriers, is exclusive.

49 U.S.C. §10501(d)(1982). While this provision could be literally interpreted to mean that it is jurisdiction over provided remedies -- and not the remedies themselves

-- which are exclusive, the legislative history belies such an interpretation:

> The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available.

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 106, reprinted in 1980 U.S. Code Cong. & Admin. News 4110, 4138.

Since this statutory provision, as illuminated by legislative history, makes clear that the only remedies regarding rail rates are those provided by federal statutes, the savings clause, 49 U.S.C. § 10103 (1982), had no application to this case. The savings clause only states that "[e]xcept as

otherwise provided in this subtitle," common law remedies are cumulative. The explicit legislative intent that only federal statutory remedies exist is precisely the type of exception contemplated by the savings provision.

The shippers would have us apply the expressly preemptive provision in 49 U.S.C. § 10501(d) only in cases in which the Commission fixed rates, and not in cases where exercised its exemption authority. The only possible textual support for such an interpretation of the section is the literal reading rejected above.

Moreover, an interpretation which viewed exempted rates as removed from jurisdiction of the Commission would be inconsistent with the statutory scheme, which provides for the Commissioner's ongoing jurisdiction over exempt traffic. 49 U.S.C. § 10505(d) permits revocation by the Commission of exemption where necessary to carry out the

transportation policy of the Act. Congress determined that "there be continuing evaluation of the appropriateness of regulation and continuing deregulation where consistent with the Act's policies." Coal Exporters Ass'n of the United States, Inc. v. United States, 745 F.2d 76, 82(D.C. Cir. 1982), cert. denied, 471 U.S. 1072 (1985). The exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision..." 49 C.F.R. § 1039.10 (1986).

The ongoing jurisdiction to reconsider the exemption in light of competitive conditions is conferred in the first instance on the Commission, no on the courts. Recognition of a common law remedy with respect to rates would have the effect of substituting a court's regulation for the Commission's decision in favor of deregulation. In the 4 R Act and Staggers Act, Congress has decided in favor of

permitting railroads to fix their own rates, subject only to the regulation imposed by the competitive market, except in cases where in the judgment of the Commission, competitive forces do not operate effectively. Until the Commission determines in a section 10501(d) proceeding that Conrail is dominant over the plaintiff shippers' traffic in agricultural products this court cannot grant relief to the shippers. See Bessemer and lake Erie R.R. Co. v. ICC, 691 F.2d 1104 (3d Cir. 1982), cert denied sub nom., Western Coal Traffic League v United States, 462 U.S. 1110 91983). As the Commission noted in the Conrail Exemption Decision:

> If another body were allowed to replace the regulatory restrictions dismantled at the Commission, the agency's exemptive actions would be nugatory. Worse, the potential for variation and conflict among various decisionmakers could make the post-exemption regime

more restrictive of rail carriers than the one suspended by exemption.

Consolidated Rail Corporation -- Declaratory Order -- Exemption, 1 ICC 2d 895 (Feb. 27, 1987).

The Commission's analysis is consistent with that of the Supreme Court in the quite analogous context of deregulation of the natural gas industry. Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board, ____ U.S. _____, 106 S.Ct. 709 (1986).3/ It is, moreover, consistent with that of other courts which have addressed the issue. See Alliance Shippers, Inc. v. Southern Pacific Transp. Co., No. 86-3837 (C.D. Cal. Nov. 19, 1986); Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R., No. 84-1267 (N.D. Ohio Sept. 25, 1986). Thus we agree with the district court that the shippers' common law claims, whether considered as arising under state or federal common law, are preempted. Abilene Cotton Oil is still the controlling rule.

Judge Aldisert is concerned that our reading of the statute leave the shippers without a remedy for price discrimination. This argument ignores that the Commission, in granting the exemption, has determined that regulation is "not needed to protect shippers from abuse of market power." 49 U.S.C. § 10505(a)(2)(b).4/ The shippers' remedy for price discrimination is simple: it can choose to use other means of transportation. Congress and the Commission have determined that the market is adequate protection; it is not the place of this court to disagree with that determination. Even if the shippers could show that Congress and/or the Commission were wrong, this would not permit us to allow damages. Thus, while it may be that the Commission would not award damages for discriminatory prices charged during a period of exemption, an issue not decided here, we do not agree that this possibility requires a different result.

C.

The shippers' constitutional law claim is that by imposing discriminatory tariffs on their traffic, Conrail deprived them of property and liberty interests without due process of law. The first district judge to whom the case was assigned dismissed this claim on the theory that common law remedies were preserved by the Staggers Rail Act, and thus that there was a remedy, satisfying due process for any deprivation which may have occurred. Conrail contends that the shippers consented to this dismissal, and thus cannot now appeal it. The record, however, is sufficiently ambiguous with respect to any such consent that we deem it appropriate to address the merit of the contention.

Every court that has considered the matter has concluded that Conrail is not a governmental actor for purposes of constitutional analysis. See Morin v. Consolidated Rail Corp., 810 F.2d 720 (7th

Cir. 1987); Myron v. Consolidated Rail Corp., 752 F.2d 50 (2d Cir. 1985); Wenzer v. Consolidated Rail Corp., 464 F.Supp. 643 (E.D.Pa.), aff'd 612 F.2d 576 (ed Cir. 1979). While Conrail is subject to extensive government regulation, such regulation does not convert its conduct into governmental action for constitutional purposes. See Rendall-Baker v. Kohn, 457 U.S. 830, 841-42(1982). Thus we join those courts that have held expressly that Conrail is a private actor.

III.

The shippers' statutory, common law, and constitutional arguments all lack merit. The summary judgment appealed from will therefore be affirmed.

ALDISERT, Circuit Judge, dissenting.

What divides this court is a straightforward disagreement. We are not

fencing with glancing blows. Our divergent views meet a single controlling issue head on: Does federal law preempt state common law claims against rail carriers for discriminatory conducted practiced during the period in which the Interstate Commerce Commission, pursuant to the Staggers Rail Act of 1980, has exempted relevant rail traffic from regulation? The majority says common law remedies are preempted in these circumstances. I say they are not. Accordingly, I dissent and would reverse the judgment of the district court.

I.

I begin by stating certain universal precepts that govern this case. To decide a federal preemption issue to to determine Congressional intent. Wardair Canada, Inc. v. Florida Dep't of Revenue, _____U.S._____ (54 U.S.L.W. 4687, 4688, June 18, 1986). In the context of federal regulation of rail carriers, repeals of common law remedies by

implication are not favored: a statute will not be construed as taking away a common law right unless the right is so repugnant that it renders the statute's provisions nugatory. Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907). These precepts strongly influence my approach to this case. Therefore, I begin with an examination of Congressional intent.

II.

Congress enacted the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1898, to dismantle the regulatory scheme established by the Interstate Commerce Act of 1887 (ICA). Influenced by nearly 100 years of railroad experience, Congress came to the conclusion that "[m]odernization of economic regulation of railroads, with greater reliance on the marketplace, is essential to achieve maximum utilization of railroads, to save energy and to combat inflaction." H. Conf. Rep. No. 1430 96th Cong., 2d Sess., reprinted in 1980

U.S. Code Cong. & Admin. News 4110, 4111. In overhauling the federal regulatory scheme, Congress desired "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101(a); see ICC v. Texas, ___U.S.___, ___ (55 U.S.L.W. 4129, 4132, Jan. 20, 1987); Consolidated Rail Corp. v. United States 812 F.2d 1444, 1449 (3d Cir. 1987).

In choosing to allow competition to play an important role in establishing rail rates, Congress granted the ICC authority to exempt from regulation categories of rail transportation when the Commission concluded that such regulation was not necessary to carry out the transportation policy as expressed in section 10101a. See U.S.C. § 10505. To "ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rules, practices, etc.," the Act "preempt[ed]

state authority over rail rates, classifications, rules and practices." H. Conf. Rep. No. 1430, reprinted in 1980 U.S. Code Cong. & Admin. News at 4138.

Congress, however, also expressed the desire "to prohibit unlawful discrimination." 49 U.S.C. § 10101a(13). With respect to the existence of common law claims, Congress amended 49 U.S.C. § 10103 to state:

> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

Thus, two conclusions are inescapable: where there is no federal regulation of rates because of the promulgation of exemptions, (1) no state may fill the void by imposing regulation of its; and (2) common law remedies are available inter alia to prohibit unlawful discrimination.

A.

It cannot be denied that prior to the enactment of the ICA and ICC, several states recognized a common law action on behalf of a shipper against a railroad for discriminatory conduct practiced by the carrier. In Messenger v. Pennsylvania R.R. Co., 37 N.J.L. 531 (1874), the New Jersey Court of Errors and Appeals determined that railroads by virtue of their common carrier status are bound to use their franchise with fairness and for the common good. "A common carrier owes an equal duty to all and it cannot be discharged if he is allowed to make unequal preferences, and thereby prevent or impair the enjoyment of the common right...." Id. at 535. The court noted that a railroad contract that gave to certain persons an exclusive advantage over all other transporters in the transportation of goods was unjust and could not be legally enforced. "For a like service, the public are entitle to a like price." Id. at 536.

In McDuffee v. Portland and Rochester R.R., 52 N.H. 430 91873), the Supreme Judicial Court of New Hampshire recognized that a rail carrier's service is a common as well as a public right, belonging to every individual as well as to the state. The court then stated:

> The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and any practical invasion of the common right by an unreasonable discrimination practiced by a carrier held to the common service, is insubordination and mutiny, for which he is liable, to the extent of the damage inflicted, in an action of case at common law.

Id., at 450; see also 2 J. Kent, Commentaries on American Law 983 (Holmes ed. 1896) ("Even at common law carrier is bound to make only reasonable charges, and perhaps

there is a further obligation not to charge two persons differently for exactly the same service."). The common law right of the shipper to be free from unjust discrimination at the hands of a rail carrier has roots in English law. In London & N.W. Ry. Co. v. Evershed, 3 App. Cas. 1029, 1035 (House of Lords 1878), Lord Chancellor Cairns stated that "[t]he one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic." It bears emphasis that these cases and holdings were decided in an era that preceded the imposition of federal railroad regulation.

B.

Our inquiry, then, must follow a very narrow compass: if common law remedies were preempted when and because the ICC assumed regulation of the railroad industry, are they

still preempted when the ICC abdicates its regulation by promulgating an exemption? To ask this question is also to answer it, yet the answer seems best expressed by Karl Llewellyn:

> [T]he rule follows where its reason leads; where the reason stops, there stops the rule.

K. Llewellyn, The Bramble Bush 157-58 (1960). The reason for the rule of federal preemption was the interposition of federal regulation. When that regulation disappears, the reason for preemption must fall with it. I think Congress intended precisely that. Both the language and scheme of the Staggers Act compel this conclusion.

III.

Regulated rail carriers subject to the jurisdiction of the ICC are generally prohibited from unreasonably discriminating between shippers when providing substantially the same service. See 49 U.S.C. § 10741. An

aggrieved shipper may seek relief from unreasonable discrimination by filing a complaint with the Commission pursuant to 49 U .S.C. § 11701. When the ICC exempts a field of rail transportation from regulation, however, the prohibitions of section 10741 do not apply to deregulated carriers because their traffic is no longer subject to the jurisdiction of the ICC. See 49 U.S.C. § 10741. Yet, in light of Congress' policy "to prohibit unlawful discrimination," 49 U.S.C. § 10101a(13), it seems to me that Congress did not intend to leave shippers without a remedy for discriminatory conduct practiced by rail carriers exempted from regulation. A common law action would provide such a remedy. And Congress expressly anticipated this under the savings clause of the Staggers Act, 49 U.S.C. § 10103.

IV.

A remedy is a procedure that gives to one who has been hurt, by another's violation

of an obligation imposed by contract or by law, a right to seek actual or substituted redress. A remedy does not guarantee redress, but does guarantee the opportunity to seek it. Conrail's interpretation of the Staggers Act falls woefully short of providing a shipper with a remedy. Under the most generous view of Conrail's argument, the shipper never has an absolute right to be heard on the merits. At the very least, the shipper is only given the right to petition the ICC to withdraw its exemption and restore regulation of the entire railroad industry's transportation of potatoes. A proceeding to restore regulation of the entire railroad industry is not the mirror image of a proceeding to prove discrimination against a particular potato shipper by a particular carrier. The jargon of produce is especially apt here: you cannot compare the apples of an application to impose industry-wide

regulation with the oranges of a claim by one shipper against one railroad for one product.

Thus, the possibility that the ICC, under 49 U.S.C. § 10505(d), may revoke a previously-issued exemption and reimpose regulation does not, as Conrail contends, guarantee an "after the fact" remedy to address the accused discrimination here. In petitioning the ICC to revoke an applicable exemption, the shipper would first have to overcome the slated Congressional goals "to minimize the need for Federal regulatory control over the rail transportation system" and "to promote a safe and efficient rail transportation system." 49 U.S.C. § 10101a(2), (3). Although Staggers invests the ICC with discretion to restore regulatory control, the proceedings before the Commission would not take place in a judicially-neutral ambience; the petitioner would have the very high burden of overcoming the legislatively-declared public policy of

minimal Federal regulatory control. Should the ICC follow its previous decision respecting and reflecting that Congressional policy, the shipper would never have a right to be heard anywhere on its charge of discrimination. I do not think Congress intended such a draconian denial of a remedy, especially under a statute that specifically provides for "remedies...at common law." 49 U.S.C. § 10103.

But let us assume the best case scenario under Conrail's theory of an exclusive statutory remedy. That best case would not afford complete redress to the shipper. Even if the exemption were revoked and new regulatory controls were instituted in futuro, there is no apparent vehicle to provide retroactive relief, a relief that seems mandatory here if primitive notions of justice are to be served. The ICC would have no power to award damages for discriminatory rates charged by rail carriers during the

interim exemption period, because the prohibitions of section 10741 do not apply to carrier not subject to the jurisdiction of the ICC. This is the black hole in Conrail's theory. I simply cannot believe that Congress intended to deny such relief to victims of discrimination.

I do not accept a statutory construction that dictates that shippers, like G & T, are denied an adequate remedy for a carrier's unfair conduct during an exemption period, or an interpretation that would require shippers to seek alternate and obviously more expensive means of shipping, such as motor or air freight. When it is considered that shippers could be damaged irreparably or forced to dissolve their businesses because of this lack of a remedy, it becomes obvious that Congress intended no such outrage. Conrail's "after the fact" remedy is in truth no remedy.

I think that the statute means only this: as long as shippers have access to the ICC to seek redress under section 10741 for a carrier's discriminatory conduct because either the ICC still regulates the rail transportation involved or has abrogated an applicable exemption, the shipper has no common law remedy; the shipper must go to the ICC and not the courts. But where, as here, the Commission has surrendered its jurisdiction over a field of rail transportation by granting an exemption pursuant to the Staggers Act, a common law remedy exists under the savings clause of the Act to remedy unlawful discrimination practiced by rail carriers during the exemption period. See First Pa. Bank v. Eastern Airlines, Inc., 731 F.2d 1113, 1120 (3d Cir. 1984) (deregulation stripping the Civil Aeronautics Board of its powers left the courts "free to proceed without circuity to apply directly the familiar federal common

law rules relating to the subject matter or released value rates"). Although I believe the foregoing is sufficient to justify the reversal of the district court's judgment, I nevertheless will address other arguments presented to us.

V.

Conrail's argument that the teaching of Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), precludes recourse to common law is a contention that warrants analysis. The centerpiece of this allegation is that the presence of a common remedy would conflict with the federal regulatory scheme, creating a lack of uniformity from state to state. See Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., ___U.S.___(54 U.S.L.W. 4114, 4118, Jan. 22, 1986) (preemption analysis should consider whether state regulation would disrupt the federal regulatory scheme); Louisiana Pub. Serv. Comm'n, ___U.S. at___. 54 U.S.L.W. at 4509

(preemption occurs when there is an outright or actual conflict between federal and state law). I have two responses to Conrail's argument.

First, a common law remedy for a deregulated rail carrier's discriminatory conduct will not conflict with the ICC's authority under 49 U.S.C. § 10741 to proscribe such conduct -- or with the Commission's power under 49 U.S.C. § 10701a to determine the reasonableness of a rate charged by a carrier -- because the common law remedy will exist only when an ICC exemption for the relevant traffic remains in effect. In Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), the Court permitted plaintiff's common law claims against an air carrier to go forward without requiring the plaintiff to first present them to the Civil Aeronautics Board for determination. In noting that there was no irreconcilable conflict between the relevant

Act's regulatory scheme and the common law remedy, the Court distinguished Abilene in language notably applicable to the present case:

> In Abilene the carrier, if subject to both agency and court sanctions, would be put in an untenable position when the agency and a court disagreed on the reasonableness of a rate. The carrier could not abide by the rate filed with the Commission, as require by statute, and also comply with a court's determination that the rate was excessive. The conflict between the court's common-law authority and the agency's ratemaking power was direct and unambiguous. The court in the present case, in contrast, is not called upon to substitute its judgment for the agency's on the reasonableness of any carrier practice.

Id. at 299-300 (emphasis supplied).

Similarly, there is no irreconciliable conflict between a common law remedy here and the ICC's jurisdiction as provided by Congress. Because the common law action is available only when the ICC surrenders its jurisdiction over the relevant traffic by granting an exemption, the courts will not substitute their judgment for that of the agency's on the reasonableness of any carrier practice. As contemplated by the savings clause of the Staggers Act, 49 U.S.C. § 10103, a common law remedy may coexist with the role of the ICC in regulating rail transportation.

If the ICC subsequently determines that rail carriers are abusing an exemption or that common law actions are advancing results inconsistent with the national transportation policy as expressed in 49 U.S.C. § 10101a, the Commission can revoke the exemption and reimpose regulation on the relevant rail traffic. See 49 U.S.C. § 10505(d). In this

event, common law actions initiated after the exemption has been revoked would be preempted as inconsistent with the federal regulatory scheme. Abilene, 204 U.S. at 446. But where the ICC has surrendered its regulatory jurisdiction, common law actions survive to provide a remedy to shippers injured by unjust discrimination at the hands of a rail carrier.

Conrail's argument also blurs the distinction between regulation of rail rates and adjudication of a tort between two parties. Citing Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., ___U.S.___ (54 U.SLW. 4114 Jan. 21, 1986), Conrail contends that recognizing a common law action for discriminatory rates would amount to de facto regulation of rail carriers. Conrail's reliance upon Transcontinental does not withstand analysis.

In Transcontinental, the Court decided whether state regulation was preempted by the

deregulation of natural gas under the Natural Gas Policy Act of 1978. The Court did not consider whether the deregulated industry was freed from the obligations imposed by common law. Furthermore, the policy concerns of Transcontinental do not apply to the case at bar because courts adjudicate -- they do not regulate. The power to regulate involves the power to develop legislatively-created standards and maxims before a dispute arises and to set rates and rules to be followed in the future. By contrast, the judicial exercise attempts to do justice between two parties in the limited context of a dispute that has already occurred. In the present case, the district court was called upon to adjudicate a tort claim filed by a shipper against a rail carrier for a discriminatory surcharge imposed on past shipments. As aptly stated by Professor Dworkin:

> [J]udges, neither should be nor are

> deputy legislators, and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating, is misleading. It misses the importance of a fundamental distinction...between argument of principle on the one hand and arguments of policy on the other.

Dworkin, Hard Cases, 88 Harv. L. Rev. 1057,d 1-58-62 (1975).

A decision by Congress that an area is best left unregulated takes away the regulatory authority of both federal and state regulatory agencies. See Transcontinental, ___U.S. at___, 54 U.S.L.W. at 4118; Illinois Comm. Comm'n v. ICC, 749 F.2d 875, 877-78 (D.C. Cir. 1984), cert. denied, ___U.S.___ (54 U.S.L.W. 3223, Oct. 8, 1985). But I refuse to make the quantum leap from there to a conclusion that Congress has also closed the door to all judicial remedies when deregulation sets in. In enacting the

Staggers Act, Congress did not intend to emasculate a body of common law, specifically contemplated by the savings clause of the Act, that was designed to remedy the discriminatory conduct Congress clearly intended to prevent. If Congress had intended to remove the common law remedy, it would have done so plainly and said so clearly.

IV.

For the reasons presented, I would reverse the district court's grant of summary judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

2. The Commission explained that Mr. Hardy's informal letter response was not binding on the agency. Consolidated Rail Corporation-Declaratory Order-Exemption, 1 ICC 2d 895 (Feb. 27, 1986)

3. Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), on which the shippers rely, is not helpful to them. In that case, the tort remedy could be utilized without intruding upon any judgment of the regulatory agency. Here, recognition of a tort remedy for discriminatory rates would involve case-by-case judicial regulation of rates in the face of a decision by a regulatory agency, acting pursuant to Congressional directives, that the market is sufficiently competitive that no regulation of rates is necessary. Surely it cannot be said here, as it was in Nader, that "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental." 426 U.S. at 300.

4. The alternative basis for an exemption, where the Commission determines that the transaction or service is of limited scope, 49 U.S.C. § 10505(a)(2)(A), is not involved in this case.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5897

G. & T. TERMINAL PACKAGING CO., INC.
and ANTHONY SPINALE,
Appellants

v.

CONSOLIDATED RAIL CORPORATION

September 23, 1987

TO: David J. Goldberg, Esq.
David H. Baker, Esq.
Laurence Z. Shiekman, Esq.
*
Kenneth P. Kolson, Esq.
William J. Hanlon, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case No. 86-5897 and copies are enclosed herewith.

* * *

Sally Mrvos, Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 86-5897
G. & T. TERMINAL PACKAGING CO., INC.
and ANTHONY SPINALE,
Appellants
v.
CONSOLIDATED RAIL CORPORATION

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and ALDISERT, Circuit Judges

The petition for rehearing filed by above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

DATED: October 22, 1987

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

G. & T. Terminal Packaging Co., Inc. and Anthony Spinale v. Consolidated Rail Corporation
Civil Action No. 84-1173

October 23, 1986
LETTER-OPINION OF HON. ALFRED J. LECHNER, JR.

Plaintiffs are engaged in the business of shipping agricultural goods by railroad. They commenced this action in 1984 seeking recovery of allegedly discriminatory rates paid by plaintiffs to defendant railroad company, and an injunction against future discriminatory rates. Judge Ackerman has previously dismissed all counts of the complaint except thos aggeging a common law cause of action against defendant. 1 Presently two motions are before the Court: (1) defendant's motion to dismiss the reamining common law claim and (2) plaintiffs' motions to restore two counts of the complaint asserting that defendant's allegedly discriminatory rates were

designed to unlawfully inhibit plaintiffs from pursuing legal remedies for shipped goods lost or damaged by defendant railroad company.

Facts

G. & T. Terminal Packaging Co., Inc. ("G & T") is a New York corporation engaged in the business of shipping potatoes from the west coast to the New York City area. Anthony Spinale ("Spinale") is President and sole stockholder of G & T. Consolidated Rail Corporation ("Conrail") is a Pennsylvania corporation engaged in the railroad business.

It appears that since at least 1983, Conrail has delivered G & T's potatoes from the west coast to G & T's terminals located in Kingsbridge and Hunts Point New York. G & T alleges that in June, 1983, Conrail imposed an additional freight charge for transportation of G & T's potatoes which caused the rate charged G & T to exeed the rate charged other comparable shippers by

some $500 to $600 per carload of potatoes. G & T has objected to the additional charges but Conrail has refused to reduce them.

By letter, dated September 30, 1983, counsel for G & T wrote to the chairman of the Interstate Commerce Commission ("ICC") to inquire whether the ICC had jurisdiction to entertain a legal action brought by G & T against Conrail challenging the allegedly discriminatory rates. By letter, dated October 11, 1983, the Director of the ICC's Office of Proceedings responded to the inquiry and indicated that because the ICC has exempted railroad carriers of fresh fruits and vegetables from virtually all previous forms of economic regulation (see discussion, infra) the ICC would not have jurisdiction to entertain G & T's suit. The letter indicated G & T would have to seek relief in the courts.

By compliant filed with this Court on March 26, 1984, G & T commenced this action

asserting that Conrail's allegedly discriminatory rates violated provisions of the Interstate Commerce Act, 49 U.S.C. § 10101 et seq. (the "Act"), the common opinions issued at hearings held on September 28, 1984 and April 8, 1985, Judge Ackerman dismissed G & T's claims under the Act and the Constitution and expressly ruled that G & T could assert its common law claims against Conrail in this Court. By stipulation of the parties filed January 2, 1985, G & T's antitrust claims were dismissed. Thus, the only cause of action remaining ~~in this~~ action is based on common law claim of rate discrimination.

It appears that on September 27, 1985, Conrail filed a petition with the ICC seeking a declaratory judgment that G & T's common law remedies in this action were pre-empted by provisions of the Act. On March 5, 1986, the ICC issued a decision concluding, contrary to its October 11, 1983 letter, that

it retained jurisdiction over all allegations of rate discrimination (the "March 5, 1986 Decision"). In addition, the ICC ruled that under its interpretation of the Act, G & T had no independent common law cause of action against Conrail.

Citing the ICC decision and a recent Supreme Court case, Conrail brings the present motion for summary judgment dismissing G & T's remaining common law claim. G & T has opposed Conrail's motion and has moved the Court to restore two counts of the complaint which Judge Ackerman previously dismissed. These two counts arise under provisions of the Act forbidding common carriers from taking steps to evade liability for damage suffered by goods shipped. G & T has submitted documents and evidence uncovered during the course of discovery in support of its claim that Conrail raised G & T's rates to inhibit G & T from pursuing

liability claims against Conrail for damaged goods.

Regulatory Framework

Originally enacted by Congress in 1887, the Interstate Commerce Act is the basic legislation governing Federal regulation of common carriers. One of the core regulatory functions of the Act is to provide a mechanism for establishing the rates common carriers are allowed to charge shippers using the carriers. The original act required the ICC to determine "just the reasonable charges," either in response to complaints of discriminatory or unreasonable rates filed by shippers against carriers, or in response to carrier requests for rate increases. See H. Rep. No. 1035, 96yh Cong., 2d Sess. Appendix, reprinted in 1980 U.S. Code Cong. & Ad. News 3978, 4025, 4029-31.

The Act was amended by the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1898, in which Congress made plain its intention

that the railroad industry be significantly deregulated. The policy subsection of the Staggers Act states:

> In regulating the rairoad industry, it is the policy of the United States Government--
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required.
>
> * * *
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail

carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital ....

49 U.S.C. §10101a.

Several other provisions of the Staggers Rail Act are relevant to the instant motions. With respect to the survival of a common law claim, 49 U.S.C. § 10103 provides: "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in

addition to remedies existing under another law or at common law." The Act establishes that the general jurisdiction of the ICC over railroad carrier transportation issues, however, is exclusive: "The jurisdiction of the [ICC] ... over transportation by rail carriers, and the remedies provded in this title with respect to the rates, classifications, rules and practices of such carriers, is exclusive." 49 U.S.C. § 10501(d).

One provision of the Staggers Act, critical to the case at bar, directs the ICC to exempt a classification or service of rail transportation from regulation under the Act where the ICC has determined that regulation "(1) is not necessary to carry out the transportation policy of section 10101a of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers

from the abuse of market power." 49 U.S.C. § 10505(a). The exemption provision further asserts the ICC may revoke, in whole or in part, an exemption which is determined to cause effects contrary to the stated policy of the Act: "The Commission may revoke an exemption, the the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title." 49 U.S.C. § 10505(d). The Staggers Rail Act's exemption provision also states that an ICC exemption does not relieve a rail carrier from its obligations to provide contractual liability for damaged or lost goods to its carriers

2 or to protect the interests of its employees. 49 U.S.C. § 10505(e), (g).

Heeding this Congressional deregulatory mandate, the ICC, in a decision dated

February 17, 1983, exempted rail transportation of agricultural commodities, including potatoes, from regulation under the Act. See Rail General Exemption Authority -- Miscellaneous Agricultural Commodities, 367 I.C.C. 298 (1983) (hereinafter referred to as "ICC Exemption Decision"). The ICC Exemption Decision asserts:

> ...continued regulation of those commodities no longer appeared necessary to serve the Nation's transportation policy objectives or to protect shippers from abuse of market power by the railroads. Analysis showed that the distribution of these commodities was characterized by one or more of the following: (1) precipitously declining market shares, (2) the availability of unregulated motor carrier alternatives; or (3) the limited nature of the remaining rail transportation.

Id. at 298. The opinion explains the exemption will ehnhance the competitiveness of railroads in the overall transportation industry and that "the record in this case in adequate to demonstrate that sufficient actual or potential competition exists in the movement of each of the exempted commodities to insure against abuse by the railroads." Id. at 300. The decision further asserts "if the railroads are shown to be abusing their market power (a highly unlikely event), then the Commission can revoke the exemption and reimpose regulation." Id. at 303.

Discussion

From a procedural standpoint, the motions now before this Court seek reconsideration of issues already decided on prior motions for summary judgment. The Federal Rules of Civil Procedure appear to allow for such review at the discretion of the Court and "upon such terms as are just." Fed. R. Civ. P. 60(b). Where there has been

an intervening change in arguably controlling law, reconsideration of the Court's earlier decisions is appropriate and serves interests of equity and judicial economy. See Max M. v. Thompson, 585 F. Supp. 317, 321 (N.D. Ill. 1984).

The parties each claim the ICC Exemption Decision constitutes a shift in the underlying legal framework of this action, sufficient to warrant reconsideration of this Court's prior findings. In addition, Conrail proffers a Supreme Court case decided subsequent to this Court's prior rulings, as controlling precedent warranting reconsideration of this Court's decision on the common law claim. Because this Court's prior rulings were based, at least in part, on the ICC letter disclaiming ICC jurisdiction over this claim of rate discrimination, the ICC's subsequent unanimous declaratory judgment that the ICC does retain jurisdiction over G & T's claim

appears to present sufficient justification warranting reconsideration of this Court's prior decisions.

In these motions the parties are asking the Court to make legal determinations as to the Court's jurisdiction over this matter and the propriety of certain claims in this action. When a court is asked to resolve questions of controlling or applicable law, such questions are properly before the Court on motion for summary judgment. See Paton v. LaPrade, 469 F. Supp. 774, 779 (D.N.J. 1978). The motions are considered in turn.

A. Conrail's Motion to Dismiss the Common Law Claim

Conrail's position in seeking dismissal of plaintiffs' common law claim against allegedly discriminatory rates is straightforward. Conrail contends that under the plain terms of the Act, and as interpreted for close to 100 years, the ICC has had and continues to have sole

jurisdiction to entertain shippers' claims of unfair or discriminatory rates against carriers. Conrail argues that when the ICC issued its decision exempting carriers of certain agricultural products, the ICC had no intention of resurrecting common law claims, assertable in courts, against allegedly unfair or discriminatory rates. To buttress this point, Conrail points to the ICC;s declaratory judgment issued March 5, 1985. Futhermore, argues Conrail, when Congress authorized the ICC to exempt from regulation certain forms of transportation, Congress did not intend to allow for the introduction of "indirect" regulation of the railroads by the courts through common law interpretation. Rather, says Conrail, both Congress and the ICC anticipated 91) that competition in the transportation industry would prevent unfair rates from occurring, and (2) that claims of unfair or discriminatory rates should be

addressed by the ICC, as warranted, by partial or total revocation of exemptions.

G & T's position that it retains its common law right to protest discriminatory rates in court is equally straightforward. G & T points out that prior to the ICC Exemption Decision, individual shippers were provided with a forum, the ICC, at which their grievances against unfair rates could be heard. When Congress gave the ICC its exemption authority, G & T asserts, Congress did not intend to leave individual shippers without remedy against discriminatory rates. Congress, says G & T, was concerned with unfettering rail carriers from restrictive and unwarranted administrative regulation, not with protecting carriers from individualized common law claims asserted by way of court adjudication. G & T claims that because the burden for obtaining revocation of an ICC exemption is difficult to meet, acceptance of Conrail's position effectively

rorecloses individual shippers from any forum for asserting discriminatory rate claims against carriers. Such a result, G & T submits, was clearly unintended by Congress when it passed the Staggers Rail Act.

The issue before the Court, therefore, amounts to a determination of Congressional intent: Whether Congress intended that railroad shippers who believe they are being charged discriminatory rates by common carriers exempted from regulation are entitled to seek relief in courts, based on common law claims, or only before the ICC, by persuading the ICC that na outstnading exemption is being abused in a manner unanticiapted or unintended by the ICC and Congress. The issue is not clearly resolved by reference to the language of the statute. 49 U.S.C. § 10103 provides that, "except as otherwise provided, the remedies set forth in the Act are in addition to other statutory and common law remedies." Yet 49 U.S.C. §

10501(d) specificies that the ICC retains exclusive jurisdiction over rail transportation generally and, more specifically, the remedies with respect to rates and practices set by railroad carriers of agricultural products from regulation, the ICC exempted carriers of agricultural products from regulation, the ICC entertained exclusive jurisdiction and authority over questions such as the one now before this Court. But the parties do dispute, and on the face of the statute it is simply unclear, how Congress intended rate discrimination charges to be aired once the ICC had exempted a classification of rail transportation from regulation.

Although the legislative history to the Staggers Rail Act does not decisively settle the issue before the Court, the history is clear that Congress' intent in this amendment to the Act was to allow a wide degree of economic freedom to those forms of

transportation exempted by the ICC from regulation. As stated in the Conference Report: "[M]any of the government regulations affecting railroads have become unnecessary and inefficient. ... Modernization of economic regulation of railroads, with greater reliance on the marketplace, is essential to acheive maximum utilization of railroads....." H. Conf. Rep. No. 1430, 96th Cong. 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 4110, 4111. The history suggests that when considering the exemption provision of the Act, Congress specifically recobnized the possibility of abuse on the part of exempt carriers. The history indicates, however, Congress felt the benefits of deregulation outweighed the potential abuses and that such abuses would be minimized by effective competition in the transportation industry, or else remedied by appropriate ICC action. As stated in the Conference Report:

> The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose. Particularly, the conferees expect that as many as possible of the Commissions' restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.

Id. at 4137.

The Conference Report proceeds to emphasize the exclusive nature of the remedies provided by the Staggers Rail Act, and its preemption of potential federal or state common law remedies:

> The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available.

Id. at 4138. Clearly the Act provides the exclusive mechanism for addressing claims of discriminatory rates, at least prior to an ICC decision exemption a class of rail transportation from regulation. Even after an ICC exemption decision, however, a strong implication to be drawn from the legislative history is that Congress recognized the potential for just the sort of abuses alleged in this case, and expected the ICC to address such abuses by reviewing the propriety of the

exemption in question in whole or in part after the emergence of such abuse.

The legislative history evidences that opponents of the Staggers Rail Act were concerned about the potential problem that railroads would abuse their monopoly position at the expense of small or "trapped" shippers. Certain Congressmen noted "the bill deregulates rates in many cases where competition is not abailable to protect shippers and consumers from excessive rate increases. ...We believe the House of Representatives should carefully review the momentous and dangerous decision made by the Committee to move deregulation... into the area where railroads enjoy a virtual monopoly position. This is an invitation to the railroads to abuse their market power." Id. at 4094, 4099. While these concerns may have been well-founded, the previously cited language from the Conference report submitted in support of the Staggers Rail Act indicates

supporters of the legislation considered these potentials for abuse could be effectively dealt with by the ICC.

G & T urges, as interpretation of the legislative history, that Congress fully intended to protect individual shippers from abuse by retaining traditional common law protections. G & T points to the statements of Senator Exon during floor debates of the Staggers Rail Act in which the Senator indicated the legislation contained adequate protection for smaller or captive shippers: "All of the protections in the Senate bill as passed on April 1 of this year are contained in the conference agreement. The include discrimination protection, the common carrier obligation, car limitation provision, and the contract rate advisory service for shippers of agricultural, forest, and paper product." Yet these protections were all specifically built into the Staggers Rail Act and were to be enforced by the ICC. There is simply no

basis for claiming Congress intended these protections be maintained and enforced independently by the courts. See e.g., 49 U.S.C. 10701 (rates must be reasonable); 49 U.S.C. § 11101 (common carrier may not discriminate as to rates or service among similar shippers). The legislative history establishes no more than that Congress expected the legislation to acheive the goals of deregulation with a minimal amount of abuse; such abuse was to be addressed by the ICC.

While no court has squarely addressed the issue now before this Court, decisions in sufficiently analogous situations bolster the conclusion that the Congressional intent behind the Staggers Rail Act was to have the Icc monitor both the deregulation of the railroad industry and the inevitable abuses springing from that deregulation. As a preliminary matter, the Supreme Court has stated that the courts should excercise

restraint in reviewing aspects of national transportation policy, as established by or delegated to the ICC: "Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. ...It is not for us [the Court] to tinker with" one element of that national policy. Board of Trade v. United States, 314 U.S. 534, 546, 548 (1942). The Supreme Court has, more recently, emphasized the importance of allowing the ICC to handle issues involving the regulation of carrier rates. In reversing a Court of Appeals decision interfering with the ICC' authority over carrier rates, the Supreme Court stated: "[The Court of Appeals' action] undermines the Commission's ability to exercise the primary jurisdiction delegated to it by Congress to insure equitable and uniform rates." Burlington

Northern Inc. v. Unites States, 459 U.S. 131, 142 (1982). Although these cases arose prior to the ICC's invocation of its exemption power, they demonstrate a longstanding recognition that maintenance and enhancement of national transportation policy has long been properly within the immediate jurisdiction of the ICC.

The Supreme Court's decision in Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd., 106 S. Ct. 709 (1986) ("Transco"), while not directly on point, provides some insight as to policies courts should consider in determining Congressional intent where Congress has authorized deregulation in a previously highly regulated field. The case required a judicial determination of Congressional intent behind enactment of the National Gas Policy Act of 1978, 15 U.S.C. § 3301 et seq., a statute which in part revoked the power of the Federal Energy Regulatory Commission ("FERC")

to regulate aspects of sales of natural gas. The case arose as a challenge to a Mississippi State Gas and Oil Board ("Board") order. The order required a purchaser of natural gas from a single source that had several producers to purchase gas without discrimination in favor of any one producer of the source's gas. The state courts had affirmed the Board order, holding that when Congress determined to preclude federal regulation over such sales of natural gas, it did not intend to preempt state regulation over such sales of natural gas.

The Supreme Court reversed the state courts, holding that when Congress decided to curb federal regulation, thereby giving "market forces a more significant role in determining the supply, the demand, and the price of natural gas," Congress did not intent "to give the states the power it had denied FERC." Id. at 717. Although the decision is arguably not controlling insofar

as it involved review of a decision of a state's regulatory authority rather than review of a court invoking common law principles, several related underlying concerns raised by Justice Blackmun in the opinion appear to have general applicability to the case at hand.

One such concern was whether allowing state regulation (in the case at bar this concern would be with judicial intervention via common law) in an area Congress intended to relieve of federal regulation would conflict with the underlying Federal interest in deregulation. A second inquiry was whether Congress intended to give states (in the case at bar this concern would be with the courts) regulatory authority Congress had denied to Federal authorities. A related concern was whether permitting the state (in the case at bar, the courts) to regulate where Federal authorities could not, would disrupt the uniformity of the Federal

regulatory scheme. Id. at 717-18. Deciiding that each of these concerns warranted against allowing the states to step in where Congress had caused the federal authority to step out, the Court held: "In light of Congress' intent to move toward a less-regulated natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations." Id. at 717.

Each of the concerns raised in Transco is applicable to the case at bar. Recognizing a judicial common law cause of action for discriminatory rates would in effect give license to de facto judicial regulation over common carrier rates. This is regulation that Congress, through the ICC, has decided is unnecessary at least until it appears the ensuing abuses cannot otherwise be curbed. Certainly permiting adjudication of discriminatory rate claims would interfere with the Congressional intention that abuses

flowing from deregulation be uniformly corrected, as those abuses surface, by ICC corrective action. Although it is true by definition adjudication is a legal process distinct from administrative regulation, in terms of practical application the inevitable effects of adjudication may not be so distinct. As the Supreme Court pointed out in Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 326 (1981): "A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act."

The problems arising when various state and Federal bodies and courts become involved in reviewing issues such as the one now before this Court, were aptly pointed out in W.D. Lawson & Co. v. Penn Central Co., 456 F.

2d 419 (6th Cir. 1972). That case involved common law and statutory claims arising from the destruction of property shipped by the defendant railroad. In ruling that the plaintiff's common law claims and been pre-empted by Federal statutory remedies, the court quoted the Supreme Court's decision in Adams Express Co. v. Croninger, 226 U.S. 491 (1913):

> 'Some States allowed carriers to exempt themselves from all or a part of the common-law liability, by rule, regulation, or contract; others did not; the Federal courts sitting in the various States were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legilative and judicial holding that it was practicly

> impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes, with but little certainty, what would be the carrier's actual responsiblity as to goods delivered to it for transportation from one State to another.' Quoting, Southern Pacific Co. v. Crenshaw [Bros.], 5 Ga. App. 675, 687, 63 S.E. Rep. 865.

W. D. Lawson, 456 F. 2d at 422. Given the legislative history to the Staggers Rail Act previously cited, it cannot be said Congress intended to return to a state-by-state regulatory scheme by reintroducing common law remedies fro allegedly discriminatory rates.

Although the March 5, 1986 Decision is not binding on this Court, its views on the scope of its jurisdiction under the Act are

entitled to due respect. See Blum v. Bacon, 457 U.S. 132, 141 (1982). The ICC's conclusions support the position that Congress intended, and the ICC understand Congress to have intended, that even after the ICC had invoked its exemption authority to deregulate a segment of the railroad industry, the ICC remained the principal authority responsible for interpreting and applying national transportation policy. As pointed out by the ICC: "If another body were allowed to replace the regulatory restrictions dismantled at the Commission, the agency's exemptive actions would be nugatory. Worse, the potential for variation and conflict among various decisionmakers could made the post-exemption regime more restrictive of rail carriers than the one suspended by the exemption." March 5, 1986 Decision at 5. The ICC's point is well taken. If aggrieved shippers could resort to the courts for relief from discriminatory

rates resulting from abuses under the deregulatory scheme, the ICC may never have an opportunity to review such abuses and address them. Such a result is clearly contrary to the evident Congressional intent behind the ICC's exemption-revocation authority.

G & T cites to Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), as support for its position that common law remedies remain available to aggrieved shippers despite the presence of an arguably controlling preclusive regulatory scheme. In Nader, the plaintiff had been "bumped" from an airline flight, despite his confirmed reservation. The plaintiff asserted common law tort claims and statutory claims against the airline. The Court of Appeals ruled, inter alia, the District Court should have withheld decision on the common law claim pending a determination by the Civil Aeronautics Board of plaintiff's statutory

claim. In reversing the Court of Appeals and allowing the plaintiff's common law tort claims to proceed, the Supreme Court explained "we are not faced with an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies. ...The court in the present case... is not called upon to substitute its judgment for the agency's on the reasonableness of a rate -- or, indeed, on the reasonableness of any carrier practice." Id. at 299-300.

As already been discussed, however, G & T's position in this action that this Court should entertain its common law claim of rate discrimination does irreconcilably conflict with the underlying deregulatory scheme enacted by Congress and implemented by the ICC. Contrary to the situation in Nader, this Court is being asked to interpret the reasonableness of a common carrier's practice. The legislative history suggests

this inquiry is to be brought before the ICC in a challenge to the underlying exemption.

In sum, G & T claims it is the victim of discriminatory rates. If such rates are in fact being charged, competition in the transportation industry is not operating effectively as Congress and the ICC expected it would when the ICC issued the exemption for carriers of agricultural products. Consequently, Conrail is allegedly in a position where it can effectively abuse its monopoly power to the detriment of G & T and other similarly situated shippers. This is precisely the type of abuse Congress intended the ICC to address "after the fact" of deregulation. H. Conf. Rep. No. 1430, 96th Cong. 2d Sess, reprinted in 1980 U.S. Code Cong. & Ad. News 4110, 4137. Conrail's motion to dismiss G & T's common law claim of rate discrimination is granted.

B. G & T's Motion to Restore Claims Under the Act

Plaintiffs have moved the Court to restore those aspects of the original complaint asserting that Conrail's discriminatory rates constitute an effort to deny plaintiffs their statutory right to pursue liability claims for goods damaged while being shipped. 49 U.S.C. § 11707 provides shippers the right to pursue such damage claims, and 49 U.S.C. § 10505(e) provides that no ICC exemption decision can deny shippers such right. G & T claims that Conrail's increased rates seek to deny indirectly a right that may not be denired directly. Conrail counters that Judge Ackerman has already squarely examined and rejected this claim, and nothing new has been added to the record to warrant rejection of Judge Ackerman's decision.

At oral argument, heard by this Court on October 20, 1986, counsel indicated that G & T's damage claims are being independently pursued in New York proceedings. In his

opinion rendered from the bench on September 24, 1984, Judge Ackerman recognized that those damage claims were underway in New York, and rejected the very claim plaintiffs now seek to resurrect: "I am not persuaded by [plaintiff's] arguments. Plaintiffs' damage claims are being independntly... litigated in separate legal proceedings. These claims will be adjudicated according to the law and amount of plaintiffs' recovery for their alleged losses will be... unaffected by the rates charged by defendant in the interim." Ackerman, J., Opinion, filed September 28, 1984, at 11-12. With respect to plaintiffs' damage liability claims, there is nothing new in the record to indicate Judge Ackerman's decision should be overturned. Clearly G & T may continue to actively pursue its damage claims through appropriate channels.

Plaintiffs' attempt to restore this aspect of the original complaint essentially

does nothing more than raise the same charge of discriminatory rates against Conrail alleged in its common law claim. As explained earlier in this opinion, Conrail's ability to drive up G & T's rates without fear of losing G & T's business to a competitor carrier is evidence of something amiss in the deregulatory scheme envisioned byi Congress and the ICC. As has already been concluded, such irregularities were intended by Congress to be addressed and corrected by the ICC. To hold otherwise would permit every shipper with a grievance against allegedly discriminatory rates, to fashoin a claim under the Act that the carrier's rates were designed to curtail the shipper's liability claims. Such a result was not intended by Congress. Because the record before me offers no tenable grounds for readdressing Judge Ackerman's decision on this issue, plaintiffs' motion seeking

restoration of Counts III and IV of the complaint is denied.

Counsel for Conrail is to submit an appropriate order. Counsel are to send copies of this Letter-Opinion to all co-counsel.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 84-1173

G & T TERMINAL PACKAGING CO., et al.,

Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION,

Defendant.

TRANSCRIPT OF PROCEEDINGS

OPINION

Newark, New Jersey
September 24, 1984

BEFORE THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appendix E

THE COURT: I agree. Thank you.

Well, we're dealing here with an action for damages and equitable relief which arose out of allegedly discriminatory rate increase imposed on plaintiff by defendant for its freight transportation services.

The record should reflect this morning that with respect to plaintiff's claim for equitable relief pursuant to Rule 65 of the Federal Rules of Civil Procedure, this Court held a hearing and rendered a decision which the parties, of course, have received, which this Court denied preliminary injunctive relief to the plaintiffs essentially on the ground that plaintiffs had failed to present evidence or irreparable harm within the meaning of the cases. And what I said has already been said.

In any event, plaintiff, G & T Terminal Packaging Company, Inc., ("G & T"), is a potato "repacker" who as part of its business, purchases potatoes from various

western states and resells them in the New York City area. These potatoes, as I noted in my original opinion, are transported to G & T's Hunts Point Terminal and its terminal in Kingsbridge, I believe in the Bronx, by various retail carriers. And because the western retail carriers do not have direct rail connections to New York City, the potatoes are ultimately delivered to the plaintiff by the defendant, Consolidated Rail Corporation (Conrail).

In essence, plaintiff alleges that beginning in June of 1983, defendant increased its freight transportation rate for goods shipped by plaintiff. Further, plaintiff alleges that the rates were not raised for other consignees or were not raised as much. In short, plaintiff alleges that defendant implementd a discriminatory and illegal rate increase. In so doing, G & T claims that Conrail has violated its rights under the Interstate Commerce Act as amended

as well as the constitution and the antitrust laws and the common law. Defendant concedes that such an increase was imposed on shipments made by the plaintiff but contests liability, claiming that the increase represents a reasonable effort to cover the costs of processing and defending the "disproportionately greater number of [damage] claims field by the plaintiff against Conrail." These claims arose out of a loss of good allegedly due to defendant's negligence and they are the subject of other lawsuits.

This case is presently before me, as I noted at the outset this morning, on cross-motions for partial summary judgment regarding plaintiff's claims under the Interstate Commerce Act (ICA) and the common law. For the reasons set forth below, I have decided to grant summary judgment in favor of the defendant on plaintiff's claims under the ICA and to deny both party's motions for

summary judgment regarding the liability of the defandant under the common law.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is not to be granted unless, afater all reasonable inferences are drawn in favor of the non-moving party, there is no genuine issue of material fact, such that the moving party is entitled to judgment as a matter of law. Receive Sames v. Gable, 732 F. 2d page 49, 52 (3d Cir. 1984).

The basic facts of the rate increase are undisputed. The questions before this Court are, (1) under what body of law does plaintiff state a cause of action and (2) applying the applicable legal standards, is either party to this action entitled to summary judgment or are there genuine issues of material fact which remain to be tried.

In essence, plaintiffs contend that the rate increase is in voilation of various provisions of the Interstate Commerce Act, 49

U.S.C. Section 10741, 11705, or alternatively, in voilation of the common law which plaintiff argues remains in effect under 49 U.S.C. Section 10103. In opposing plaintiff's motion, in support of its cross-motion, defendant contends that it is except from the provisions of the ICA, that the remedies provided thereunder are exclusive 49 U.S.C. Section 10501(d), and alternatively that the common law did not prohibit discriminatory rates.

*The parties in their oral presentations presents this mirrored these arguments which they have made quite will in their briefs.

I turn first to plaintiff's claims under the ICA and what is known as the Staggers Act. Title 49 is concerned with discriminatory rate setting in a variety of its subsections. Section 10741(a) of Title 49 of the United States Code (Supp. 1984) states that a common carrier providing transportation by rail "may not charge or

receive from a person a different compensation ... for a service rendered ... than it charges or receives from another person for performing a like or contemporaneous service in the transportation of a like kind of traffic under substantially similar conditions. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates."

Section 10741(b) further provides that a "common carrier providing transportation or service subject to the jurisdiction of the [Interstate Commerce] Commission ... may not subject a person, place, port or type of traffic to unreasonable discrimination."

Moreover, [a] rate ... related to transportation or service provided by a common carrier subject to the jurisdiction of the Interstate Commerce Commission ... must be reasonable." 49 U.S.C. Section 10701(a) (Supp. 1984).

The Act provides that "A common carrier providing transportation [buy rail] subject to the jurisdiction of the commission ... is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle." 49 U.S.C. Section 11705(b)(2).

Further, "[a] person may file a complaint with the commission ... or bring a civil action under (b)(1) or (2) of this section to enforce liability against a common carrier ..." 49 U.S.C. Section 11705(c)(1). Under these sections, a shipper may generally seek damages against a common carrier who sets a discriminatory rate for transportation or service. And they may seek that in a federal court. See Thurston Motor Lines v. Jordan K. Rand, Ltd., 103 S. Ct. 1343 (1983). I note, however that in such a civil action a court must take cognizance of the fact that "primary jurisdiction to determine the reasonableness of rates lies with the

Commission," Burlington Northern, Inc. v. United States, 103 S. Ct. 514 at 521 (1982), and must ordinarily "refrain from expressing a preliminary view on what national transportation policy permits before the ICC expresses its view." Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800, at 821 (1973).

For the reasons which follow, I find that Section 10741(a) is inapplicable in this case and I need not be concerned with the concept of "primary jurisdiction" in the instant application. Under Section 10505(a), "the Commission shall exempt a person, class of persons, or a transaction or Service when the commission finds that the application of a provision of this subtitle (1) is not necessary to carry out the transportation policy of Section 10101(a) of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to

protect shippers from the abuse of market power." The Commission may grant total or partial exemptions from the strictures of the ICA, see Simmons v. ICC, 697 F. 2d 326 at 332 and 34, (D.C. Cir. 1982), and "[t]he commission may revoke and exception to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of Section 10101(a) of this title." 49 U.S.C. Section 10505(d). Section 10101(as) articulates national transportation policy and includes promotion of "safes, adequate and efficient transportation," 49 U.S.C. Section 10101(a)(1)(B), and "the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices." Section 10101(a)(1)(D).

In enacting the Staggers Act which authorized the Commission to pursue exemptions from regulation under the ICA, it is clear that Congress envisioned "a policy of reviewing carrier actions after the fact to correct abuses of market power." See House of Representatives Report No. 96-1430, 96th Congress, 2d Sess., 105, reprinted in 1980 U.S. Code Congressional and Administrative News 4110, 4137, I've added the emphasis.

Consequently, the Commission may exempt carriers from regulation under even Section 10741(b) quoted supra as long as the exemption fosters national transportation policy since, "should the railroads develop and abuse market power by engaging in unreasonably discriminatory conduct, the exemption will be revoked" and regulation restored. American Trucking Association v. ICC, 656 F. 2d 1115 at 1123 and 1124, (5th Cir. 1981). I've omitted the footnote.

It is undisputed that the ICC has exempted Conrail and other rail carriers from regulation under the pertinent subtitle of the ICA insofar as they are engaged in transport of agricultural commodities including potatoes with the exception of grain, soybean and sunflower seeds. See 49 C.F.R. Section 1039.10. Pursuant to its authority under Section 10505, the Commission decided to "exempt the rail transportation of fresh fruits and vegetables from all provisions of Subtitle IV [relating to Interstate Commerce] of Title 49" with the sole exception of certain informational accounting and reporting requirements which the Commission considered necessary to the monitoring and continued jurisdiction under Section 10505. See Rail General Exemption Authority - Fresh Fruits and Vegetables, 361 ICC 211, (1979). The Commission specifically stated that "we believe that the small percentage of this traffic moving by rail,

does not warrant continued regulation under Section 10741."

While I do not understand the plaintiffs to be challenging the validity of the exemption at this time, I note that the Commission has justified its decision in this regard. In a subsequent proceeding, responding to contentions that deregulation would lead to discrimination and the abuse of market power, the Commission stated: "Such abuse, however, may occur only in the absence of effective actual or potential competition. Competition may come either from other railroads other modes ... or market competition between the product in question and competing products or regions. The evidence with regard to the commodities to be exempt is ample to demonstrate the availability of competitive alternatives -- a small and/or declining rail market share indicating the existence of traffic diversion by competing modes for relatively shore hauls

indicating a potential for effective motor carrier competition. In addition, where remaining rail traffic is profitable, market competition for the commodity or region in question will require that rates be kept at competitive levels for the railroad to retain the traffic." See Rail General Exemption Authority-Miscellaneous Agricultural Commodities, 367, 289 (1983).

The Commission went on to state "that if the railroads are shown to be abusing their market power (a highly unlikely event) and the Commission can revoke the exemption and reimpose regulation."

Based on the foregoing, I find that the defendant is exempt from regulation under Section 10741. The Commission itself has confirmed the view that the general exemption describes supra applies to the parties and facts of this case, and I refer the parties to a letter that was mentioned during the colloquy, the name of Herber P. Hardy,

Director, ICC, dated October 11, 1983 which was an exhibit to the complaint.

I therefore conclude, as I indicated at the outset, that defendant is entitled to summary judment as a matter of law on all of plaintiff's claims under 49 U.S.C. Section 10741(a) and (b). As to the requirements of this subsection, plaintiff's remedy is to seek partial revocation of the exemption before the Commission unless it chosses to challenge the existing exemption as "arbitrary and capricious" under the governing case law. See American Trucking, 656 F. 2d at 1125. Neither of these claims are before me today.

I turn now to plaintiff's claim under 49 U.S.C. Section 11707. As to regulation of defendant under this Subsection 49 U.S.C. Section 10505(e) specifically provides that [n]0 exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide

contractual terms for liability and claims which are consistent with the provisions of Section 11707 of this title." Section 11717 further states that [a] common carrier may not limit or be exempt from liability imposed under Subsection (aq) of this section except as provided in this subsection." 49 U.S.C. Section 11707(c)(1), I've added the emphasis.

Consequently, if applicable, the defendant remains subject to regulation under 1170 of Title 49. See American Trucking Company, 656 F. 2d at 1124.

Section 11707(a) provides that a carrier is liable to the person "entitled to recover under the receipt or bill of lading" which must be issued by a carrier. "The liability imposed under this paragraph is for the actual loss or injury to the property caused by" the carrier. Except as provided in Section 11707, as noted supra, a carrier may not contract to limit liability imposed by this section. 49 U.S.C. Section 11707(c)(1).

Plaintiff makes a rather vigorous argument in this regard. As noted above, defendants contend that the basis for rate increase on shipments by the plaintiffs is reasonable and undiscriminatory in that the correction is intended to cover the cost of processing and defending a disproportionate number of damage claims fueld by plaintiff against defendant.

Plaintiffs further allege that defendant told them that the rate would be decreased if they stopped filing damage claims. Plaintiffs now argue that the rate increase is an indirect attempt to limit liability in violation of Section 11707(a).

I am not persuaded by this argument. Plaintiff's damage claims are being independently -- I may say this, I'm not persuaded by this argument in disposing of this aspect of the motions made this morning. Plaintiff's damage claims are being independently litigated in separate legal

proceedings. These claims will be adjudicated according to the law and amount of plaintiff's recovery for their *alleged losses will be -- and the amount of plaintiff's recovery for their alleged hospitalization will be unaffected by the rates charged by defendant in the interim.

I see nothing in Section 11707 indicating that a carrier may not increase rates to maintain a profit margin over and above claims. Plaintiff has cited me to no authority to the contrary. If defendant is setting rates in an unreasonable or discriminatory manner, plaintiff must invoke other provisions of the ICA, the common or some other source of law entitling them to relief. I find that defendant is entitled to summary judgment as a matter of law on plaintiff's claims under 11707(a) of the Act.

I turn finally to plaintiff's claims under the common law. In invoking the common law, plaintiff points to 49 U.S.C. Section

10103 in support of the contention that the ICA as amended has not preempted prior case law. Section 10103 states: "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law."

Defendant argues that whereas "the remedies provided ... with respect to the rates, classifications, rules and practices of ... carriers, is exclusive." 49 U.S.C. 10501(d), Congress has "otherwise provided" as stated in Section 10103 and plaintiff has no remedy under the common law. I do not agree.

First, Section 10501(d) when read in full states that "the jurisdiction of the commission and of state authorities (to the extent such authorities are authorized to administer the standards and procedures of this title ...) over transportation by rail

carriers, and the remedies provided in this title is exclusive."

In short, the section states that the jurisdiction is exclusive and not that the remedies are exclusive. The use of the singular verb form "is" confirms this reading.

As pointed out during the colloquy, defendant, in reading the provision to mean that the remedies are exclusive, inserts the term "sic" after the singular verb form and cites this Court to the legislative history of the Staggers Rail Act of 1980. See House Conference Report No. 1430, 96th Congress, 2d Sess., reprinted in, the United States Code Congressional and Administrative News 3987, at 4138 (1980).

It is true that the House Conference Report states that "[t]he remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the

Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available." I do not read this statement as precluding plaintiff's reliance on common law where the statute does not as a general matter abrogate common law, see 49 U.S.C. 10103; see also PLM, Inc. v. Consolidated Rail Corporation, 490 F. Supp. 194 at 196 (E.D. Pa. 1980), where the statutory language unambiguously states that the jurisdiction of the Commission, not the remedies under the Act, is exclusive, see 49 U.S.C. Section 10501(d) and where the Commission has explicitly exempted the defendant from regulation and told the plaintifff by letter to seek relief in the courts. The case cited by defendant is inapposite for these very reasons. See Caspary v. Louisiana Land & Exploration Company, 707 F. 2d 785, 791 (4th Cir. 1983).

I therefore conclude that plaintiff may proceed with claims under common law. I cannot believe that while providing for the exemption of carriers from regulation such as those in defendant's position in this case, Congress intended to leave shippers without any remedy at all.

Regarding the applicable common law, defendant argues that it does not prohibit discriminatory rates citing to American Trucking Association v. Atchison, Topeka & Santa Fe Rail Company, 367 U.S. 397, 406 (1967). Whether or not this is so, defendant concedes in its brief at Page 26 that prior to the Act the common law "demanded little more than that [carriers] should carry for all persons who applied and that their charges for transportation should be reasonable." ICC v. B&O Railroad,, Baltimore and Ohio Railroad, I presume, 145 U.S. 263, 275 (1892).

In my judgment defendant therefore concedes that even under the common law its rates must be reasonable. Reviewing the affidavits submitted to this Court, I note there are numerous genuine issues of fact material to a determination of the reasonableness of the rate imposed by the defendant in this case. Reasonableness of the rate imposed by the defendant in this case. Reasonableness is a determination best left to the trier of fact after a full hearing on the merits. Futhermore, 1 note that discovery has not yet been completed, and I have decided to deny motions for summary judgment as to plaintiff's claims under common law.

In sum then, plaintiff's motion for summary judgment is denied in full, while defendant's cross-motion is granted insofara as it addresses plaintiff's claims under the ICA as amended and denied in so far as it addresses plaintiff's common law claims.

May I ask defendant's counsel to kindly draw an order in conformance with my determination here this morning.

MR. SHIEKMAN: I will do that.

THE COURT: Thank you so much.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO. 84-1173

G&T TERMINAL PACKAGING CO., et al.,

Plaintiffs,

-vs-

CONSOLIDATED RAIL CORPORATION

Defendant.

TRANSCRIPT OF PROCEEDINGS
MOTION

Newark, New Jersey

April 8, 1985

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appearances:

WARREN, GOLDBERG, & BERMAN, ESQS.
BY: DAVID J. GOLDBERG, ESQ.
Attorneys for Plaintiffs

PEPPER, HAMILTON, & SCHEETZ, ESQS.
BY: DEBRA COHEN, ESQ.
Attorneys for Defendant

APPENDIX F

THE COURT: May have the appearances, please.

MS. COHEN: Debra Cohen for Conrail Corporation.

MR. GOLDBERG: David J. Goldberg, for the Plaintiff G & T Terminal.

THE COURT: Now, at the outset I would like to personally apologize to all Counsel for delay in getting out my decision which will be delivered this morning with respect to Conrail's Petition for Reconsideration. I can only tell you by way of explanation and excuse that since the beginning of this term, with the exception of two weeks, I have been constantly involved in trying criminal matters. And with the exception of Motion Days. And I'm just completing now an eight-week trial and I'm charging the jury Wednesday morning and Thursday I start another criminal case, and on the 23rd I'm starting a ten-week criminal trial. What I'm trying to say, desperately

and perhaps not articulating it too well, is that my schedule because of the effect of the Speedy Trial Act on our severely strained calendar and limited personnel, which has been the subject of publicity in the newspapers, I know you're from Philadelphia but I assure you that it's been a matter of public interest in the State of New Jersey. We are down three judges and no hope in sight at this point. It's just horrendous. It's just a terrible situation and it's just put me in a position where I have fallen behind. So I apoligize to both sides and I will be ruling this morning. I know the parties did not expect oral argument on that point. We are here this morning in addition to that with respect to defendant's Motion to dismiss Count 6 of plaintiff's Complaint in this matter, okay? So I'll be issuing two decisions this morning.

Miss Cohen, I've read your papers with respect to your Motion with respect to Count

6 and essentially, as I read it, it's that Conrail is not a State actor and, therefore, plaintiff hasn't go a leg to stand on.

MS. COHEN: That's essentially correct, your Honor.

THE COURT: Is there anything else you want to say with respect to the points that you made in your brief?

MS. COHEN: No, your Honor. We have covered everything in our brief.

THE COURT: All right.

Mr. Goldberg?

MR GOLDBERG: Your Honor, on the Summary Judgment Motion, I think that we have given the response fully in our papers. I would say that while I understand what the Court said about the Motion for reargument, there is one case I would add to the extent that the Court could possibly consider it. It is in a sense cumulative but it's Nader v. Allegheny Airlines and I would bring that to the Court's attention, 426 U.S. at 299. And

it refers to the Abilene case. And it's consistent with the argument we make that the nature of the statute before Abilene as against what is now before this Court is totally different.

THE COURT: All right. Let me deal with the two problems which are presently before me.

This is an action for damages and equitable relief arising out of alleged discriminatory rate increases imposed on plaintiff, a potato re-packer named G & T Terminal Packaging Co., by the defendant, Consolidated Rail Corporation (Conrail) for its freight transportation services. This is not the first time the parties have been before this Court on this matter as they both know.

On June 11, 1984, a hearing was held and by Opinion filed September 7, 1984, I denied plaintiff's application for preliminary injunctive relief.

Then on September 24, 1984, on Cross-Motions for Partial Summary Judgment, I granted Summary Judgment to defendant on plaintiff's claims under the Interstate Commerce Act as amended and denied both parties' Motions with respect to plaintiff's claims under the common law. Defendant then timely moved for reargument and reconsideration of this Court's denial of its Motion for Summary Judgment with respect to plaintiff's common law claims. On consent of all parties I decided to make my decision on defendant's Motion under Local Rule 12I without benefit of oral argument pursuant to Rule 78 of the Federal Rules of Civil Procedure. And as noted a few minutes ago, this Motion until this morning was still pending before this Court, for the reason I hope I have adequately given to the parties.

This matter is also presently before me this morning, as just noted, on defendant's Motion for Summary Judgment on Count 6 of the

Complaint filed February 15, 1985. I've decided, in the interests of judicial economy and because of the interrelationship between the pending Motions herein, to rule on both the pending Motion for Reconsideration and the instant Summary Judgment Motion.

I turn first to defendant's Motion for Reconsideration. For the reasons set forth below, I have decided to deny defendant's Motion in this regard.

Rule 12I of the Rules of the U.S. District Court for the District of New Jersey, provides for reargument and reconsideration only where Counsel presents new factual matters or controlling decisions which this Court has overlooked in rendering the ruling regarding which reconsideration is requested. Although the rule itself is silent on this point, I may also reconsider a prior ruling if I am "convinced that it is clearly erroneous and would work a manifest injustice." See Arizona v. California, 103

S. Ct. 1382 at 1391, n. 8 (1983) (discussing law of the case doctrine).

The defendant herein does not seriously contend that new facts or controlling decisions have come to light which were not considered by this Court in its September 24 oral ruling. Thus I turn to the question of whether my denial of defendant's Motion for Summary Judgment on plaintiff's common law claims was clearly erroneous. Although the legal question presented is not without doubt, I do not believe that my holding was clearly erroneous.

In my September 24th Opinion, after concluding that defendant was entitled to judgment on plaintiff's claims under the Interstate Commerce Act as a matter of law, I further concluded that common law remedies were available to plaintiff. I held in pertinent part as follows: I turn finally to plaintiff's claims under the common law. In invoking the common law, plaintiff points to

49 U.S.C. Section 10103 in support of the contention that the ICA as amended has not preempted prior case law. Section 10103 states: "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law."

Defendant argues that whereas "the remedies provided . . . with respect to the rates, classification, rules and practice of . . . carriers, is exclusive," 49 U.S.C. 10501(d), Congress has "otherwise provided" as stated in Section 10103 and plaintiff has no remedy under the common law. I do not agree.

First, Section 10501(d) when read in full states that "the jurisdiction of the commission and of state authorities (to the extent such authorities are authorized to administer the standards and procedures of this title . . .) over transportation by rail

carriers, and the remedies provided in this title is exclusive."

In short, the section states that the jurisdiction is exclusive and not that the remedies are exclusive. The use of the singular verb form "is" confirms this reading.

As I pointed out during the colloquy, defendant, in reading the provision to mean that the remedies are exclusive, inserts the term "sic" after the singular verb form and cites this Court to the legislative history of the Staggers Rail Act of 1980. See House Conference Report No. 1430, 96th Congress, 2d Sess., reprinted in, the United States Code Congressional and Administrative News 3978, at 4138 (1980).

It is true that the House Conference Report states that "(t)he remedies available against rail carriers with respect to rail rates, classification, rules and practices are exclusively those provided by the

Interstate Commerce Act, as amended, and any other Federal statututes which are not inconsistent with the Interstate Commerce Act. No State law or Federal or State common law remedies are available." I do not read this statement as precluding plaintiff's reliance on common law where the statute does not as general matter abrogate common law, see 49 U.S.C. 10103; se also PLM, Inc. v. Consolidated Rail Corporation, 490 F. Supp. 194 at 196 (E.D. Pa. 1980), where the statutory language unambiguously states that the jurisdiction of the Commission, not the remedies under the act, is exclusive, see 49 U.S.C. Section 10501(d) and where the Commission has explicitly exempted the defendant from regulation and told the plaintiff by letter to seek relief in the courts. The case cited by defendant is inaposite for those very reasons. See Caspary v. Louisiana Land & Exploration Company, 707 F. 2d 785, 791 (4th Cir. 1983).

I therefore conclude that plaintiff may proceed with claims under common law. I cannot believe that while providing for the exemption of carriers from regulation such as those in defendant's position in this case, Congress intended to leave shippers without any remedy at all.

I further concluded that the common law required that rates for transportation services be reasonable and that genuine issues of fact precluded summary adjudication of plaintiff's common law claims in this regard.

In support of its argument that the Interstate Commerce Act as ammended by the Staggers Act premepts all State common law and regulatory power regarding the reasonableness of rates, defendant relies heavily on the Supreme Court's decision in Texas & Pacific Railway v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

In Abilene, the Supreme Court addressed the question of what effect the ICA, prior to its revision in 1980 by the Staggers Rail Act, had "upon the right of shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission . . . and which it was the duty of the carrier under law to enforce as against the shippers." See Page 436.

The Supreme Court concluded that such common law remedies were inconsistent with the ICA and that continued viability of such remedies would result in the virtual destruction of the ICA and its remedial provisions. See Pages 439 to 442.

I find this case to be entirely distinguishable from the instant one. First, Abilene was decided long before the ICA was

amended by the Staggers Act in "an attempt to revitalize the nation's railroad system by substantially deregulating rate-setting for interstate rail carriers: such as the defendant herein. See, for example, State of Texas v. United States, 730 F.2d 339, 344 (5th Cir. 1984).

Second, Abilene addressed the question of whether a Court could review the reasonableness of a rate established by the Commission and not the reasonableness of a rate establshed by a carrier which has been deregulated under the Staggers Act and exempted by the Commission itself from the requirements of the ICA. Se Abilene at Page 448.

Defendant also relies on a series of Supreme Court cases decided after the Staggers ACt was enacted. See Burlington Northern, Inc. v. United States, 459 U.S. 131 (1982); Chicago & Northwestern Transportation Co. v. Kalo Brick & Title Co., 450 U.S. 311

(1981); Consolidated Rail Corp. v. National Association of Recycling Industries, Inc., 449 U.S. 609 (1981) (per curiam). These cases, too, are distinguishable from the instant one.

In essence, these cases make clear that when a particular carrier policy or practice is squarely within the jurisdiction of the Commission and the Commission either has acted or has jurisdiction to act on the merits of the shippers' complaint, the Commission has both "exclusive," see 49 U.S.C. Section 10501(d) (Rev'd 1984); Kalo Brick, 450 U.S. at 325, and "primary," see Burlington Northern, 459 U.S. at 141; Recycling Industries, 449 U.S. at 612, jurisdiction over the matter. That the Commission's jurisdiction is exclusive, with the exception of certain State agencies certified by the ICC, means that a shipper may not seek common law redress in court where it has already been denied in relief it

seeks by the Commission or when the Commission's doors remain open to the shipper in this regard. See Kalo Brick cited supra at pages 325 and 326.

Primary jurisdiction, by contrast, "means that a shipper complaining that a carrier's rate, rule or practice is unreasonable or discriminatory must exhaust the administrative jurisdiction over the subject matter before seeking a judicial determination of the question." See First Pennsylvania Bank v. Easter Airlines, Inc., 731 F.2d 1113, 1120 (3d Cir. 1984).

Neither the doctrine of "exclusive" nor that of "primary" jurisdiction bar plaintiff's pursuit of common law remedies in this case.

With regard to the Commission's exclusive jurisdiction, the Supreme Court has held "that the ICA precludes a shipper precludes a shipper from pressing a State Court action for damages against a regulated

carrier when the ICC . . . reaches the merits of the matters the shipper seeks to raise in State Court. We reserve for another day the question whether such a cause of action lies when no application is made to the Commission." Kalo Brick cited supra at Pages 331 and 332. (Emphasis added).

In the instant case, the Commission has ecplicitly deregulated Conrail with respect to the sort of freight transportation services at issue in this case. Furthermore, when plaintiff attempted to seek redress from the Commission it was told that for this reason the Commission could provide no redress and that plaintiff would instead have to seek relief in the courts. The Director of the Office of Proceedings of the ICC, Heber P. Hardy, in response to a letter by plaintiff's Counsel, specifically wrote to Counsel as follows: The ICC no longer excercises jurisdiction over the rates charged by the railroads fr the movement of

the commodities covered by the exemption or over the practices engaged in by the railroads in the course of transporting them. Because your client and its affiliates appear to deal only in products covered by the agricultural commodities exemption, any dispute they may have with Conrail, or other railroads, would have to be settled in the courts rather than before the Commission. See letter of Mr. Hardy dated October 11, 1983, Exhibit B to Complaint.

I cannot see, under the circumstances presented herein, how either doctrine can preclude plaintiff from pursuing common law remedies at this juncture.

I turn now to the question of whether the ICA or the Staggers Act amending its preempts State common law remedies for unreasonable rates charged by common carriers. The Supreme Court has recently summarized the law of Federal preemption: "When federal pre-emption is invoked under

the directive of the Supremacy Clause, it falls to this Court to examine the presumed intent of Congress. See Fidelity Federal Savings & Loans Assn. v. De la Cuesta, 458 U.S. 141, 152-153 (1982). Our task is quite simple if, in the federal enactment, Congress has explicity mandated the pre-emption of state law, see Shaw v. Delta Air Lines, 462 U.S "-- I don't have the page citation--" (1983), or has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

"Even in the absence of such express language or implied congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law. Such actual conflict between state and federal law exists when 'compliance with both federal and state regulations is a physical

impossibility,' Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Hines v. Davidowitz, 312 U.S. 52, 67 91941). See Michigan Canners and Freezers Assn. v. Agricultural Board, 467 U.S. "-- once again, 1 don't have the page number --" (1984); Fidelity Federal Savings & Loan Assn. v. De la Cuesta, supra."

Brown v. Hoten and Restaurant Employees & Bartenders, 104 S.Ct. 3179 at 3185 (1984); see also Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

As noted supra, the ICA as amended by the Staggers Act states that "(e)xcept as otherwise provided . . . the remedies provided . . . are in addition to remedies existing under another law or at common law." 49 U.S.C. Section 10103. In essence, defendant argues that the exclusive

jurisdiction provision of the Act, 49 U.S.C. Section 10501(d), as construed in light of the House Report, acts as express or implied intent to preempt State law. In considering this argument, I am mindful "of the clear statement rule of statutory construction governing such a conclusion. Under this rule, a Court cannot find that a Federal law preempts State regulation of an activity historically regulated by the States, unless Congress has given a 'clear statement' of its intent to preempt." See State of Texas cited supra at Page 341 citing Jones v. Rath Packing Co. cited supra at Page 525.

In light of these considerations, the holding in Kalo Brick quoted supra and my holding that the exclusive jurisdiction of the Commission does not preclude an aggrieved shipper from seeking redress in court where the Commission has declined to exercise its jurisdiction, I find that the exclusive jurisdiction provision does not itself

indicate a preemptive intent of Congress sufficient to abrogate State law remedies of the sort invoked herein.

I do not believe that State of Texas is to the contrary. In that case, the Fifth Circuit held that Section 214 of the Staggers Act of 1980, 49 U.S.C. Section 10501, 10707a, 10709, and 11501, preempted State regulation of intrastate rate-setting for interstate rail carriers. 730 F.2d at 346-48, 353. Noting that the Staggers Act instituted "a major reallocation of regulatory authority between the Federal and State Governments," See Page 345, through the "elimina(tion) (of) independent State regulation of the intrastate rates of interstate rail carriers," see Page 346, the Court found "preemption of State law (to be) implicit in the goals and operation of the . . . Act . . . ." See Page 347.

The Court noted the Act's intent to deregulate, giving "carriers the freedom to

set competitive rates determined mainly by market forces," see Page 345. I've omitted the footnote and eliminating "the previous lack of rate-setting." See Page 347. The Court concluded that the Act clearly intended to preempt State regulation of rate-setting.

I agree that after the Staggers Act, a State may not implement its own statutory scheme regulation rate-setting without proper certification by the ICC. However, this rule does not govern this instant case. That a State regulatory scheme is preempted in no way implies that State common law is preempted so as to preclude a State Court or a Federal Court applying State law, from granting relief to an individual shipper who is aggrieved by an individual who has set the rates in issue, not the State, and that a Court may hold the carrier accountable in damages under common law is simply one of the market forces a deregulated carrier must consider in setting competitive rates.

Turning, then, to the question of whether a common law right of action for damages for an unreasonable rate charged by a deregulated common carrier "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See Hines v. Davidowitz, 312 U.S. 52, 67 (1941) quoted in Brown, 104 S. Ct. at 3185. I find that it does not.

I do not believe that judicial adjudication of the reasonableness of rates pursuant to common law in those circumstances where neither the primacy nor exclusivity of the Commission's jurisdiction bars judicial redress, see my discussion supra, is in any way inconsistent with or an obstacle to the Congressional goal of deregulation of the rail industry. And, as I stated orally on September 24, I do not believe that in deregulating rail carriers and providing for ICC exemption as in the instant case, that Congress intended shippers to have no remedy

at all for the imposition of unreasonable rates. While I am aware that plaintiff could seek revocation of the exemption by the Commission, an individual example of the abuse of market power by this defendant in this case is unlikely to achieve that result.

My conclusion in this regard is substantially bolstered by the Third Circuit's decision in First Pennsylvania Bank, 731 F.2d 1113. In that case, the Court of Appeals considered the effect of deregulation of air carriers on the rights of aggrieved litigants. The Court found that when the Civil Aeronautics Board (CAB) "was shorn of its powers to pass upon the reasonableness of rates for interstate air transportation of property" the doctrine of "primary jurisdiction" was "abrogated pro tanto" and "(t)he Courts were thus left free to proceed without circuity to apply directly the familiar Federal common law rules...." See Page 1120.

In short, in the context of a statutory scheme not dissimilar to the one at issue here, the Court concluded that "(t)he legal sequelae of deregulation, therefore, had no impact upon the applicability of the Federal common law . . ." See Page 1122. While the Court did not discuss the question of preemption, implicit in its holding is the conclusion that Congressional intent to deregulate does not preempt common law causes of action with regard to practice in question.

I, therefore, conclude that neither the primacy or the exclusivity of the ICC's jurisdiction nor the generally preemptive effect of the Staggers Act regarding State regulation of rate-setting preclude G & T Terminal Packaging from pursuing its common law claims in this court. The Motion for Reconsideration is denied.

I turn finally to the defendant's Motion for Summary Judgment on Count 6 of

plaintiff's Complaint. For the reasons set forth below, I have decided to grant defendant's Motion in this regard.

Count 6 states as follows: "To the extent that Conrail has been authorized by Federal law, or by action of the Interstate Commerce Commission to impose this discriminatory additional freight charge upon plaintiffs, plaintiffs' constitutional rights to due process and equal protection has been violated."

In support of its Motion, Conrail argues that plaintiff has failed to state a claim under the U.S. Constitution because Conrail is a private company, is not a State actor under the cases and thus there is no State action alleged. In light of my ruling supra, I need not address defendant's arguments further.

In its brief, plaintiff has made the following statements to this Court through Counsel:

(1) "Plaintiff's contentions under Count 6 of the Complaint would arise only if it is finally conlcuded judicially that plaintiff's have no remedy under either the ICA or the common law . . . ." See Page 2.

(2) "The Constitutional issues . . . need not be reached by this Court in view of the decision that plaintiff's common law rights have not been abrogated by Congressional action." See Page 2.

(2) "Plaintiffs concede that these Constitutional rights are not triggered if remedies are available to them pursuant to Federal law of the common law." See Page 4.

Based on these concessions and because I've held that plaintiff may pursue its common law remedies, Summary Judgment is granted in defendant's favor on all Constitutional claims without prejudice. As I understand it, plaintiff does not oppose this relief in light of my holding supra.

I don't know who to turn to draw the Order. I suppose in the final analysis I should call upon you, Mr. Goldberg. Have you submitted an appropriate Order?

MR. GOLDBERG: Well, I don't think my Order would cover the precise relief that the Court has fashoined this morning.

THE COURT: If it does not, then may I impose upon you to sumit an Order which does?

MR. GOLDBERG: Yes, your Honor. I will submit such an Order.

THE COURT: Thank you.

MS. COHEN: Thank you very much, your Honor.

(Whereupon, the matter stands adjourned.)

INTERSTATE COMMERCE COMMISSION
DECISION
No. 40045

CONSOLIDATED RAIL CORPORATION-DECLARATORY ORDER-EXEMPTION

The Commission finds that it does not lose jurisdiction over a matter that it has exempted from its regulation pursuant to 49 U.S.C. 10505. Moreover, no common law rights or remedies are revived by virtue of the exemption. The only recourse available to a person aggrieved with respect to a matter that has been exempted under Section 10505 is to petition for partial or complete revocation of the exemption under 49 U.S.C. 10505(d).

Constance C. Abrams, Russell M. Blau, Paul A. Cunningham, Richard B. Herzog, and Laurence Z. Shiekman for Consolidated Rail Corporation.

David J. Goldberg for G. & T. Terminal Packaging Co., Inc.

Decided: February 27, 1986

Appendix G

Consolidated Rail Corporation (Conrail) has asked us, pursuant to 5 U.S.C. 554(e), to resolve a controversy concerning the existence and extent of our jurisdication over rates charged for movements which we have exempted from our regulation pursuant to 49 U.S.C. 10505. We find that a declaratory order is appropriate here. The issue presented is purely legal one that does not require any factual determinations. Yet it arises from a genuine controversy which requires a resolution of the issue.

BACKGROUND

The immediate controversy involved here related to the rates charged by Conrail to the G. & T. Terminal Packing Company, Inc. (G&T) for transcontinental shipments of potatoes in 1983 and 1984. G&T claims that the rates charged to it were discriminatory because they substantially exceeded the rates Conrail charged other similarly situated shippers.

Rail carriers subject to the jurisdiction of the Interstate Commerce Commission, such as Conrail, are generally prohibited from unreasonably discriminating between shippers for providing substantially the same service. See 49 U.S.C. 10741. An aggrieved shipper may normally seek relief from unreasonable discrimination by filing a complaint with the Commission pursuant to 49 U.S.C. 11701.

However, under 49 U.S.C. 10505, the Commission has the power to exempt "a person, class of persons, or a transaction or service" from most provisions of the Interstate Commerce Act (ICA) when we find that regulation is not necessary. 1/ The movements involved in this controversy had been exempted from rate regulation by the Commission pursuant to this Section 10505 power.

Specifically, we exempted rail transportation of potatoes from our

regulation in Rail General Exemption Authority--Miscellaneous Agricultural Commodities, 367 I.C.C. 298 (1983).2/ We found (id. at 302-303) no need to regulate the transportation of most agricultural products due to:

> the availability of competitive alternatives--[as evidenced by] a small and/or declining rail market share indicating the existence of traffic diversion by competing modes, or relatively short hauls indicating a potential for effective motor carrier competition.

We concluded (id. at 302) that the abuses to which our regulation is primarily addressed "may occur only in the absence of [such] effective actual or potential competition." But we also pointed out (id. at 303) that "if railroads are shown to be abusing their market power (a highly unlikely event), then the Commission can revoke the exemption and

reimpose regulation." (See 49 U.S.C. 10505(d).)

In September, 1983, G&T wrote to former Chairman Taylor outlining its dispute with Conrail and explaining that it contemplated "pursu[ing] legal remedies." It asked for clarification of whether or not the Commission had "any remaining jurisdiction" with respect to discrimination disputes regarding exempted movements. Because G&T did not submit a formal petition to the agency, it did not receive a formal Commission determination of the issude. Instead, it received an informal letter response from the former Director of the Office of Proceedings stating, in pertinent part, his opinion that:

> The Interstate Commerce Commission no longer exercises jurisdiction over the rates charged by the railroads for the movement of the commodities covered by the exemption or over the practices

engaged in by the railroads in the course of transporting them. Because your client and its affiliates appear to deal only in products covered by the agricultural commodities exemption, any dispute they may have with Conrail, or other railroads, would have to be settled in the courts rather than before the Commission.

Relying on that advice, G&T brought a civil action in the United States District Court for the District of New Jersey (G. &. T. Terminal Packaging Co., et al. v. Consolidated Rail Corporation, Civil No. 84-1173) to obtain relief from the alleged discrimination. G&T claimed that it was entitled, under 49 U.S.C. 11705, to bring a civil action in federal court for a violation of Section 10741. Alternatively, it claimed a right, assertedly preserved under 49 U.S.C. 10103, to bring an action under the common law for violation of the common carrier

obligation to provide service on reasonable and non-discriminatory terms.3/

The District Court, on September 24, 1984, dismissed G&T's claims under the ICA, but held that G&T was entitled to a hearing under the common law to determine if Conrail's charges were unreasonable and discriminatory. Conrail moved for reconsideration of that ruling, but its motion was denied on April, 8, 1985.

Nevertheless, Conrail continues to believe that the Commission retains exclusive jurisdiction over any dispute with respect to rates or service on exempted movements and that there is no surviving common law cause of action with respect to common carrier obligations. Conrail maintains that G&T's exclusive remedy is to petition the Commission for total or partial revocation of the commodity exemption. It asks us to issue a formal declaration to that effect.4/

NEED FOR DECLARATORY ACTION

We recognize that the issue presented to us here is also before a federal district court in the pending civil litigation and that the federal court is competent to interpret the statute and determine jurisdictional issues of this nature. It is not our intention to undermine the court proceeding. Nonetheless, we believe it is appropriate for this agency to also consider the issue at this time, for several reasons.

First, we would not want the court to be induced by our silence into placing undue reliance on an informal letter that is not a formal, final determination by the agency itself, but only a staff member's opinion. Regardless of any appearance of authority, such a staff opinion is not binding on the agency. See Thompson v. Texas Mexican R. Co., 328 U.S. 134, 146, (1946) (Secretary of ICC, who had rejected a tendered application on grounds that the Commission lacked jurisdiction over the matter, could not bind

the agency by his action). However, because parties may be understandably misled by incorrect advice given in the letter, we believe we have an obligation to set forth the agency's views on the subject.

Second, as the agency charged with administering the ICA, we have the initial responsibility to interpret that Act and to determine our own jurisdiction. Our doing so should aid the court in its deliberations.

Finally, the court action is predicated on an asserted lack of jurisdiction by this agency. However, an administrative agency's jurisdiction, like that of a court, is a matter which cannot be waived or estopped by previous actions. See Commonwealth of Pennsylvania v. ICC, 561 F.2d 278, 286-87 (D.C. Cir. 1977) (Commission's earlier determination that it lacked jurisdiction over a matter is not binding on the agency and does not preclude later determination that it does possess that jurisdiction).

Indeed, "[a]uthority actually granted by Congress . . . cannot evaporate through lack of administrative exercise." Federal Trade Comm'n v. Bunte Bros., 312 U.S. 349 U.S. 437, 454-455 at n.18 (1946) (Administrative agency may await an appropriate opportunity or clear need to determine the extent of its jurisdiction). Therefore, if we have jurisdiction over a matter, it is our duty to assert it whenever we may reach that conclusion, no matter how belatedly it may appear to be in the context of particular litigation.

JURISDICTIONAL DETERMINATION

We conclude that we do retain jurisdiction over movements exempted under Section 10505 and that our jurisdiction over rail rates and practices of the sort involved in the present dispute is exclusive. There is no surviving common law cause of action.

There can be no serious question at this point that the Interstate Commerce Act vested

this Commission with exclusive jurisdiction over the rates and practices of interstate rail carriers, incorporating and superceding the common law relating to common carrier duties. See Arizona Grocery v. Atchison Ty., 284 U.S. 370, 384 (1932); Texas & Pc. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 440-441 (1907). In the areas under the Commission's jurisdiction, there are no surviving common law causes of action preserved by Section 10103 for the courts to administer. As the Supreme Court explained in Texas & Pac. Ry, 204 U.S. at 446-447 (emphasis added):

> [Section 10103] . . . cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the [ICA]. In other words, the act cannot be held to destroy itself . . . . [T]he manifest purpose of [Section 10103] was to make plain the intention that any

> specific remedy given by the act should be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

Moreover, Section 10103 is no longer applicable to rail rates, classifications, rules and practices. it was expressly overridden by the addition, in 1980, of 49 U.S.C. 10501(d). That section states (emphasis added):

> The jurisdiction of the Commission . . . and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

Thus, it is clear that the ICA preempts the field of transportation regulation and that, at least where the Commission exercises jurisdiction over rail carrier rates, classifications, rules and practices, its

regulation is exclusive. The only issue that we need consider here is whether an exemption issued pursuant to Section 10505 can serve to extinguish the Commission's jurisdiction and revive the common-law with respect to common carrier duties. We believe the answer is clearly that it does not, given the structure and purpose of Section 10505.

We begin our analysis by looking to the plain language of Section 10505, which indicates that granting an administrative exemption does not diminish the ICC's statutory jurisdiction. (Of course the Commission may only exempt a matter that is in its jurisdiction.) Granting an exemption on the basis of the statutorily required findings merely affects "the application of a provision of the [the ICA]." 49 U.S.C. 10505(a) (emphasis added). Facially, the statute does not empower the ICC to remove any matter from its statutory jurisdiction.

Morever, any Section 10505 exemption is revocable, in whole or in part, at any time. 49 U.S.C. 10505(d). See Railroad Exemption-Export Coal, 367 I.C.C. 570 (1983), rev'd on other grounds sub nom. Coal Exporters Ass'n v. United States, 745 F.2d 76 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 2151 (1985). Thus, unless this revocation power is a nullity, the granting of an exemption is not -- and cannot be -- a permanent abrogation of federal jurisdiction. The potential for total or partial reimposition of regulation is always present. (Indeed, one could view the right of any person to seek selective or complete revocation of an existing preemption as the functional equivalent of a Section 11701 complaint.)

The revocation power is one of the central features of Section 10505. It ensures the usefulness of the exemption process as a means of testing and determining

the appropriate bounds of regulation in a changing transportation environment without the need for continual Congressional attention. Congress envisioned exemptions as an experimental process. It explicitly directed us to grant exemptions and then rely upon "after the fact" remedies, such as revocation. H.R. Conf. Rep. 96-1430, 96th Cong. 2d Sess. 105 (1980).

A substitution or reintroduction of regulation by another forum (whether it be a state regulatory body or another federal body such as a court) would defeat the fundamental purpose of the exemption process -- "to allow the [Commission] to grant exemptions from those requirements of the Act that were not eliminated by the [statutory] deregulation amendments" and to remove "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers." H.R. Conf. Rep. 96-1430, supra, at 105. If another body were allowed to

replace the regulatory restrictions dismantled at the Commission, the agency's exemptive actions would be nugatory. Worse, the potential for variation and conflict among various decisionmakers could make the post-exemption regime more restrictive of rail carriers than the one suspended by the exemption.

We believe the issue considered here is in many ways analagous to the one recently considered by the Supreme Court in Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi, 54 U.S.L.W. 4114 (decided January 22, 1986). There, the Court ruled that the federal deregulation of natural gas pricing in the Natural Gas Policy Act of 1978 (NGPA) did not constitute a retreat from federal occupation of the field and that states are therefore not permitted to step in and regulate the matter. Of course, the situation presented here is even stronger because the ICC does not lose

jurisdiction over transportation that we have exempted under Section 10505, whereas the Federal Energy Regulatory Commission (FERC) had lost the power to regulate natural gas pricing. But we believe that the same considerations which led the Court there to conclude that Congress did not allow substitute regulation by states apply with equal force to the situation before us here and dictate that ICC-issued exemptions not be nullified by regulatory actions brought in federal courts. Cf. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 324 (1981) (State cannot impose sanctions upon, or create a cause of action against, a regulated rail carrier for doing that which only the Interstate Commerce Commission has the power to declare unlawful or unreasonable.)

Much of what the Court said in Transcontinental about federal natural gas regulation could easily describe federal rail

transportation regulation. The ICA also represents "a comprehensive regulatory scheme." Transcontinental, 54 U.S.L.W. at 4117. And, "in the early 1970's it [also] became apparent that the [rail] regulatory structure was not working [well]." Id. the Commission's artificial pricing restrictions were also said to be a major cause. Id. The partial deregulation of the rail industry, and the creation of the current Section 10505 mechanism for further deregulation by the agency itself, in the Rail Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980, was designed in large part "to give market forces a more significant role in determining . . . the price" of rail services. Id. at 4118. Thus, in the words of the Court, the "federal decision to forgo regulation . . . [here represents] an authoritative federal determination that the area is best left unregulated, and . . . [has] as much

preemptive force as a decision to regulate." Id. (emphasis in original), quoting Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375, 384 (1983).

Consequently, the only recourse of an aggrieved shipper such as G&T is to seek a revocation of the applicable exemption, at least as to its shipments. If it is successful, it can obtain a remedy for any proven unlawful activity from which it has suffered. If it is not successful in having the exemption lifted for it, it may seek judicial review of the Commission's decision that regulation of the activity involved is still not necessary to satisfy federal rail transportation policy.

FURTHER RELIEF

Conrail also asks for the institution of a proceeding to determine whether the exemption involved here should remain in effect as to G&T. (Conrail opposes any revocation of the exemption.) We believe

that such a proceeding is unwarranted at this point and should await a request from G&T if it wishes to pursue that avenue. As the party seeking the change from our previous decision and the status quo, G&T would bear the burden of showing that our regulation is needed to carry out the national rail transportation policy. It should be fully prepared to shoulder that burden before we institute such a proceeding.

We find:

The Commission does not lose jurisdiction over a matter that it has exempted from its regulation pursuant to 49 U.S.C. 10505. No common law rights or remedies are revived by virtue of the exemption. The only recourse available to a person aggrieved with respect to a matter that has been exempted under Section 10505 is to petition for partial or complete revocation of the exemption under 49 U.S.C. 10505(d).

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley. Commissioner Lamboley concurred with a separate expression.

James H. Bayne
Secretary

(SEAL)

COMMISSIONER LAMBOLEY, concurring:

By this decision we are re-introducing ourselves

into a controversy of our own making to acknowledge the error of an administrative advisory determination made by a Director of the Office of Proceedings that there is a loss or waiver of subject matter jurisdiction as a result of an exemption. Such is not the case.

It is an error we, of course, can remedy by simple statement. In my view, we need not attempt a more expansive treatment in an effort to "brief" the District Court.1/

However, this acknowledgement is a necessary communication to the Court which ably distinguished certain case relying in good measure upon the Commission's declination of jurisdiction. With this clarification of operative fact, the Court may wish to re-visit the "exclusive/primary" jurisdictional issues with the knowledge that we erroneously disavowed jurisdiction which effectively denied a forum for relief.

Supreme Court, U.S.
FILED
FEB 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G. & T. TERMINAL PACKAGING CO., INC., and ANTHONY SPINALE,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Circuit Court Of Appeals For The Third Circuit

BRIEF *AMICI CURIAE* OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF *AMICI CURIAE* OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

INTEREST OF *AMICI CURIAE*

Amicus National Small Shipments Traffic Conference, Inc., includes among its members individuals, small companies and major corporations. Conference members ship millions of pounds of freight each year by railroads and motor carriers. *Amicus* Drug and Toilet Peparation Traffic Conference, Inc., includes most major manufacturers of drugs, medicines and toiletries, as well as many smaller companies, all of whom participate in conference activities in their capacities as shippers of freight by railroad and motor carrier. Hereinafter, *Amici* will be referred to as "Shipper Conferences".

Both Shipper Conferences are non-profit membership corporations, and both have been very active for many years in representing their members' interests in transportation issues that arise before Congress and state legislatures, regulatory agencies (in particular, proceedings before the Interstate Commerce Commission), and courts. The Shipper Conferences participated as *amici* below in the U.S. Court of Appeals for the Third Circuit, as well as in the summary judgment proceedings in District Court.

As shippers using exempt transportation services, members of these Shipper Conferences will be exposed to the same denial of any effective remedy for carrier abuses of market power or violations of legal responsibilities as that suffered by Petitioners in this case. Because of the importance of the issues raised in this case and because

the decision below must not be sustained, *Amici* Shipper Conferences urge this Court to grant the petition for a writ of certiorari and to reverse the decision of the Court of Appeals below.

II.

SUMMARY OF ARGUMENT

The number of shippers whose rail freight moves under an exemption order issued by the ICC under 49 USC § 10505 has grown rapidly in recent years, to the point where shippers using regulated rail service are becoming, if they have not already become, a distinct minority. Because of this enormous expansion in the scope of exempt rail transportation service, the decision of the Third Circuit below, holding that exempt railroads are not subject to common law remedies and that they may offset or deter shipper loss and damage claims through individual rate surcharges, is an extremely important one. In so holding, the court reduces shipper remedies against exempt railroads to the vanishing point.

On the issue of the availability of common law remedies, the Third Circuit makes new law. The court relies on past cases finding common law remedies preempted where there are regulatory remedies before the agency, but expands those precedents to cover a situation in which there is no current agency remedy for the violations which took place and only a limited chance for a prospective remedy. The court also relies on cases holding state regulatory remedies preempted by Congressional deregulation, but expands those precedents to cover a situation in which state regulation is not at issue, the deregulation is by an agency, and the governing statute expressly preserves common law remedies. The result of

the Third Circuit's holding is to expose shippers to irreparable injury at the hands of exempt railroads.

On the issue of railroad rate surcharges to offset or deter shipper loss and damage claims, the Third Circuit's decision, which rests on the merits of the legal question rather than on preemption grounds, effectively ends railroads' historic responsibility as common carriers for the safety of shippers' freight, and renders nugatory Congress' express statutory preservation of loss and damage liability for exempt railroads.

III.

ARGUMENT—REASONS FOR GRANTING THE WRIT

A. The Decision Below Injures Every Shipper in the Country.

At issue in this case are two fundamental questions of enormous importance to the Nation's shippers who depend on exempt rail transportation: whether such shippers have any meaningful remedies in the event of abuses of market power or violations of legal responsibilities by railroads providing transportation service under an exemption granted by the Interstate Commerce Commission, and whether such railroads have any meaningful liability for loss or damage to the freight entrusted to their care. The exemption in question has been defended by the ICC[1] and the Third Circuit[2] as "not needed to protect shippers from an abuse of market power" (49 USC

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[1] ICC Docket No. 40045, *Consolidated Rail Corporation-Declaratory Order-Exemption*, 1 ICC 2d 895 (1987), Petitioners' Appendix G, pp. 142a, *et seq.* (hereinafter *Conrail Exemption Decision*).

[2] *G&T Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F2d 1230, 1235 (3d Cir. 1987), Petitioners' Appendix A (hereinafter *G&T Terminal*).

§ 10505(a)(2)(B)). However, it would be difficult to imagine a more egregious abuse of market power, or a clearer violation of the statutory obligations which Congress preserved for exempt railroads, than this case presents.

Petitioners G&T Terminal Packaging Co., Inc. and Anthony Spinale, G&T's President (hereinafter "G&T") ship Idaho and other western potatoes thousands of miles by rail to New Jersey, where they are delivered by Consolidated Rail Corporation ("Conrail"), the only railroad serving G &T. Because of the absence of rail competition, the infeasiblity of using trucks for such long movements of such a high-bulk, low value commodity, and the impossibility of substituting locally-grown potatoes for the Idaho variety in G&T's business, G&T is effectively captive to Conrail.[3]

Conrail transports G&T's potatoes pursuant to an exemption issued by the ICC. The validity of the Commission's original decision exempting from regulation the rail transportation of potatoes (among other commodities) is not challenged.[4] However, 49 USC § 10505, the section of

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[3] *See* G&T's Petition for Writ of Certiorari, at 12-13.

[4] Ex Parte No. 436 (Sub-No. 2), *Rail General Exemption Authority-Miscellaneous Commodities*, 45 Fed. Reg. 20484 (March 28, 1980). Although this exemption predated the October 1, 1980 effective date for the Staggers Rail Act of 1980, Pub.L. 96-448, 94 Stat. 1895, there are indications in the legislative history of that Act that its provisions on exemptions were intended to apply to earlier exemption orders of the ICC. See the discussion by Representatives Matsui and Florio, 126 Cong. Rec. H8582 (1980):

> *Mr. Matsui:* I have one other colloquy, if I may. This pertains to section 314, subparagraph (e). As the chairman and ranking minority member know, the ICC cannot exempt a carrier from certain liability standards under this section; however, on page 60 of the report language it states that the amendment applies

the Interstate Commerce Act dealing with exemptions, essentially preserves the railroads' "Carmack Amendment" liability for loss or damage to shippers' freight, even after an exemption order has been issued. 49 USC § 10505(e).[5]

G&T filed certain claims with Conrail for loss and damage to its freight. In so doing, it was exercising a right of shippers that existed before railroads were regulated, continued while they were regulated, and has been maintained by Congress even after exemption. Conrail refused to pay, and G&T brought various court actions, which Conrail is currently defending. Not content with its right to avoid liability if it is able to mount a successful defense to G&T's loss and damage actions, Conrail evidently decided to teach G&T (and possibly other captive shippers, by example) a lesson. Notwithstanding the statutory loss and damage provisions of 49 USC § 10505(e),

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prospectively. It uses the phrase "prospective change".

It is my understanding that this section applies to exemption orders issued before enactment of this legislation. Is this, in fact, correct?

Mr. Florio: That is correct, as well.

In the proceedings below it has been assumed that the potato exemption is governed by 49 USC § 10505 as amended by the Staggers Act, and *Amici* Shipper Conferences share that view.

[5] The Carmack Amendment, former 49 USC § 20(11), is now codified at 49 USC § 11707. It embodies the common law rule of full carrier liability for freight loss and damage, and provides that actions to recover on loss and damage claims not paid by the carrier shall be brought in the U.S. District Courts or State Courts. For a discussion of the history of carrier loss and damage liability, from common law days through the Staggers Act, see *Co-operative Shippers, Inc.* v. *Atchison, T & S.F. Ry.*, 613 F. Supp. 788, 789-91 (N.D. Ill. 1985), *rev'd on other grounds*, No. 86-1075 (7th Cir. Feb. 10, 1988). See also *First Pennsylvania Bank* v. *Eastern Airlines, Inc.*, 731 F.2d 1113 (3d Cir. 1984).

Conrail retaliated against G&T by publishing a surcharge applicable to G&T's freight alone of $500 to $600 per car. With such an arrangement, Conrail cannot lose. If Conrail is found liable for loss or damage to G&T's potatoes, it can recover through its discriminatory surcharges any damages awarded G&T.[6] When G&T protested, Conrail informed it that the surcharge would be substantially eliminated if G&T would agree not to file any more claims.[7]

G&T subsequently brought the action that underlies its Petition to this Court. As relevant to the case at this stage, G&T sought to challenge Conrail's surcharge as unlawful discrimination in violation of the common law (the statutory prohibition against discrimination having been rendered ineffective by the Commission's exemption order), or, alternatively, to challenge the surcharge as a violation of 49 USC § 10505(e), which preserves exempt railroads' Carmack Amendment liability.[8]

In its *G&T Terminal* decision, the Third Circuit majority held, over a vigorous dissent by Judge Aldisert, that G&T's common law discrimination claim was preempted

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[6] Indeed, it is not clear that Conrail's recovery would have to stop at the level of G&T's damages. As will be seen, G&T might also find itself paying Conrail's legal fees, even if Conrail loses the court cases.

[7] G&T Petition, at 7. Conrail has denied that its surcharge was in retaliation for G&T's assertion of its right to have its freight delivered intact and in good condition, but this case involves the appeal of summary judgment rulings against G&T, and G&T's contentions must be accepted as true. See *G&T Terminal*, 830 F.2d at 1233-34.

[8] G&T's decision to seek relief in court was based in large part on advice from the Director of the ICC's Office of Proceedings to the effect that the ICC lacked jurisdiction over G&T's issues. This advice was subsequently reversed by the Commission itself, in the *Conrail Exemption Decision*, after G&T's court action was under way.

by federal law, and would have to be raised before the ICC, if and when that agency could be persuaded to revoke, in whole or in part, its potato exemption. G&T's charges of violation by Conrail of 49 USC § 10505(e) were dismissed too, but not on preemption grounds. The court held, on the merits, that Conrail's retaliatory surcharge to deter loss and damage claims does not violate federal law.

As is explained in more detail in the sections of this brief that follow, the first of these holdings opens the door to irreparable abuses of market power by railroads; the second writes Section 10505(e) out of the Act, and effectively terminates a centuries-old requirement that carriers face liability for loss or damage to the goods of the public entrusted to them for transportation.

At the outset *Amici* wish to impress on the Court the broad reach of the Third Circuit's holding. Since Section 10505 was added to the Interstate Commerce Act in 1976, the Commission has used the exemption power there provided to remove ever larger segments of rail transportation from regulation. Many shippers, some courts, and even some Commissioners have regarded the Commission's zeal to deregulate through exemptions as excessive.[9]

The Commission has now exempted most agricultural commodities, with grain and soybeans the main excep-

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[9] See *Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985), in which the court affirmed in part, and reversed in part, the ICC's decision exempting all rail transportation in boxcars. See also *Coal Exporters Ass'n* v. *United States*, 745 F.2d 76 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985), vacating the Commission's decision to exempt all export coal movements. There were dissents to the Commission decisions in both cases. 367 ICC at 599 and at 777.

tions,[10] and all rail transportation of frozen foods.[11] Very recently, in a decision served February 9, 1988 in ICC Docket No. 346 (Sub-No. 24), *Rail General Exemption Authority—Miscellaneous Manufactured Commodities*, the Commission has proposed, apparently *sua sponte* and over the dissent of Commissioner Simmons, to exempt the rail transportation of most manufactured commodities, and has requested comments on its proposal.[12]

Amici Shipper Conferences cite these instances (which do not constitute a complete list of ICC exemptions) not to challenge the Commission's use of its exemption authority. This is not the place for such a challenge. However, it should be apparent that the time is coming, if it has not already arrived, when the number of rail shippers served under ICC exemption orders far exceeds the number of rail shippers served subject to regulation.

The facts of this case would warrant review on a writ of certiorari even if this case had no significance beyond a single potato shipper injured by an abusive monopoly railroad. But there is nothing in the decisions below to limit the challenged holdings to G&T, or even to shippers under the potato exemption.[13] To the contrary, the Third

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[10] *Rail General Exemption Authority—Miscellaneous Agricultural Commodities*, 367 ICC 298 (1983).

[11] *Exemption from Regulation—Rail Transportation Frozen Food*, 367 ICC 859 (1983).

[12] A brief summary of the Commission's full unpublished decision was published in the Federal Register at 53 Fed. Reg. 3900 (February 10, 1988).

[13] Not only do the decisions below not rest on any features unique to G&T or potato shippers, but there was considerable confusion as to the applicable exemption. Judge Ackerman appears (see Petitioners' Appendix at 100a) to attribute the exemption to *Rail General*

Circuit's holdings are likely to affect every shipper using any exempt rail transportation service. In view of the fact that this category of shippers is likely to include almost every shipper in the country, the decision below is one of enormous importance, meriting careful review by this Court. For the reasons explained in the next sections of this brief, that decision cannot be sustained.

B. The Decision Below Erred in Concluding that Common Law Remedies Against Exempt Railroads are Preempted.

The Third Circuit majority in *G&T Terminal* rejected G&T's common law discrimination claims largely on the strength of two cases: *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and *Transcontinental Gas Pipe Line Co.* v. *State Oil & Gas Board*, 474 U.S. 409 (1986). The majority's legal analysis cannot withstand scrutiny.

In the *Abilene Cotton Oil* case, this Court, after observing that repeals by implication are not favored and that a statute will not be construed as taking away common law rights unless survival of such rights would negate the statute (204 U.S. at 437), held that common law remedies duplicative of remedies before the ICC were preempted. The problem with applying the *Abilene Cotton Oil* rule to the *G&T* case is that it equates remedies

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Exemption Authority—Fresh Fruits and Vegetables, 361 ICC 211 (1979), but see 361 ICC at 217-18, n.6, where the Commission notes that a potato exemption is being considered elsewhere. In its *Conrail Exemption Decision* (Petitioners' Appendix at 144a-145a), the Commission attributes the potato exemption to *Rail General Exemption —Miscellaneous Agricultural Commodities*, 367 ICC 298 (1983), but see 367 ICC at 308, where the Commission observes that potatoes had already been exempted.

before the ICC against a regulated railroad, which obviate the need for common law remedies, with remedies before the ICC against an exempt railroad, which clearly do not. Moreover, in enlarging the rule of *Abilene Cotton Oil* into a rule against the continued vitality of common law remedies against deregulated as well as regulated carriers, the Third Circuit fails to deal adequately with 49 USC § 10103.[14]

In the *Transcontinental Gas Pipe Line* case, the Court concluded that there was no implied Congressional intent to allow state regulation to fill the gap left by federal deregulation of certain kinds of gas sales. The problem with applying *Transcontinental Gas Pipe Line* to the G&T case is that no attempt has been made by G&T to invoke state regulatory remedies. The Third Circuit is thus not applying the rule of that case, but expanding it to cover federal common law, in addition to state regulation, and it is taking this step in the context of Commission, rather than Congressional, deregulation, under a statute which expressly preserves "remedies existing . . . at common law."

The Third Circuit does not ignore 49 USC § 10103, but it regards that section as repealed by 49 USC § 10501(d), which provides for exclusive ICC jurisdiction. 830 F.2d at 1234. However, the natural reading of this section, and the reading that is consistent with the rule against implied abrogation of common law remedies, is that Commission jurisdiction preempts common law remedies only so long as that jurisdiction is exercised, rendering common law remedies unnecessary, but not when that jurisdiction is

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[14] Section 10103 states: "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law."

surrendered. The Third Circuit's interpretation leaves a wide-open gap in legal remedies for acts illegal at common law.

The Third Circuit adverts to policy reasons for finding common law remedies unavailable, suggesting that allowing such remedies to survive could lead to conflicts with ICC regulation or to a lack of uniformity from state to state. But those concerns are not well founded. As Judge Aldisert points out in his dissent (830 F.2d at 1239-40), there is no conflict between common law remedies and ICC regulation so long as the former are limited to periods when ICC jurisdiction is inactive due to an exemption. And a federal common law on discrimination by exempt railroads is no more susceptible to lack of uniformity than federal common law as to loss and damage claims. See *First Pennsylvania Bank, supra.* See also *Quasar Co.* v. *Atchison, T.& S.F. Ry.*, 632 F. Supp. 1106, 1112-13 (N.D. Ill. 1986) ("when a question of the liability of a carrier falls outside statutory coverage, rather than leave the shipper without a remedy courts have turned to federal common law"), and *Deiro* v. *American Airlines, Inc.*, 816 F.2d 1360, 1365 (9th Cir. (1987), discussing the "federal common law governing common carriers."

If anything, policy considerations (like legal considerations) militate in favor of retention of common law remedies as a check on the otherwise uncontrolled behavior of exempt railroads. The result of the Third Circuit's decision is to deny relief to a shipper with a well-pleaded (and presumptively true, on summary judgment) case of discrimination. G&T's only hope for *any* relief on its discrimination claim is to commence an exemption revocation proceeding at the ICC, and hope it can prevail. If the ICC decides to revoke the exemption in part and restore its jurisdiction over Conrail potato service to

G&T, G&T must then try to win a discrimination case.[15] Even if successful in these proceedings, which could easily take years, G&T would never be made whole for injuries suffered during the period of the exemption.[16]

This Court stated in *New York* v. *United States*, 331 U.S. 284, 296 (1947): "The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." Discrimination is a serious matter to shippers in competitive markets. Even a brief period in which competitors are favored with lower cost service can produce irreparable injury, and an extended period of discrimination for a rail captive shipper can lead to bankruptcy. It is anomalous that under the Interstate Commerce Act (which expressly preserves common law remedies) a shipper like G&T can be told that it has no remedy against discrimination other than to leave Idaho potatoes to its competitors.

It must also be recognized that the Third Circuit's holding is not limited to G&T, or for that matter to discrimination. With one exception—loss and damage liability, which was also largely wiped out by the Third Circuit— an exemption decision under 49 USC § 10505 eliminates all statutory controls over a railroad's dealings with its shippers. If all common law remedies are also

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[15] For a discussion of the difficulties facing G&T in such a proceeding, see *Harborlite Corp.* v. *ICC*, 613 F.2d 1088 (D.C. Cir. 1979).

[16] See Judge Aldisert's dissent, 830 F.2d at 1239. The Third Circuit majority's response to Judge Aldisert's concern that G&T would be left with no remedy was to say (803 F.2d at 1235-36): "The shippers' remedy for price discrimination is simple: it can choose other means of transportation." For a New Jersey seller of Idaho potatoes served by a single railroad, the court's solution is a variant of "Let them eat cake."

eliminated, an exempt ralroad can do whatever it likes, not just as to rates, but also as to service. Indeed, there would be nothing to prevent a railroad from refusing to serve a shipper at all.[17] It is a rare rail dependent shipper that can survive a total embargo for long enough to pursue an exemption revocation proceeding, the sole remedy left under the Third Circuit's rule in *G&T Terminal Co.* The Third Circuit's holding that all common law remedies are preempted as to an exempt railroad is bad law and bad policy.

C. The Decision Below Erred in Concluding that Rate Surcharges to Offset or Deter Loss and Damage Claims are Lawful.

Most of the attention of the parties and the courts below was devoted to the question of whether common law remedies against an exempt railroad are preempted under federal law. However, the Third Circuit also addressed G&T's contention that, in using rate surcharges to deter G&T from filing and pursuing its claims against Conrail for loss and damage to freight in transit, Conrail was violating 49 U.S.C. § 10505(e), which preserves even an exempt railroad's Carmack Amendment liability. The Third Circuit's holding on this issue is, in some respects, even more damaging to shippers than its holding on G&T's common law claims, and even more far-reaching in its significance.

At the District Court level, Judge Ackerman appeared to dispose of G&T's case on this issue on preemption

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[17] In fact, it appears that Conrail considered just such a solution to its problems with G&T. See Petition for Writ of Certiorari at 14. If G&T succeeded in having the ICC lift its exemption to the extent necessary to address G&T's discrimination claims, Conrail might still be able to pursue other avenues of retaliation.

grounds, as merely another form of G&T's discrimination case. Judge Ackerman stated (Petitioners' Appendix at 87a):

> Plaintiffs' attempt to restore this aspect of the original complaint essentially does nothing more than raise the same charge of discriminatory rates against Conrail alleged in its common law claim. As explained earlier in this opinion, Conrail's ability to drive up G&T's rates without fear of losing G&T's business to a competitor is evidence of something amiss in the deregulatory scheme envisioned by Congress and the ICC. As has already been concluded, such irregularities were intended by Congress to be addressed and corrected by the ICC.

Although the Third Circuit's *G&T Terminal Co.* decision purports to affirm Judge Ackerman, that court disposes of G&T's argument that Conrail violated Section 10505(e) not on preemption grounds but on the merits. In a single paragraph (830 F.2d at 1233), the Third Circuit majority finds, as a matter of law, that Conrail's use of surcharges to offset or deter G&T's loss and damage claims does not violate the Interstate Commerce Act.

For the reasons set forth above, *Amici* Shipper Conferences submit that the courts below erred in holding G&T's common law remedies preempted. That holding appears to leave G&T the avenue of seeking relief before the ICC, though such relief is likely to be more apparent than real. But in approving on the merits Conrail's retaliatory rate surcharges, the Third Circuit is denying G&T even the apparent relief of a Commission proceeding to revoke the exemption. For G&T, or any other shipper threatened with rate surcharges if it files loss and damage claims against an exempt railroad, the Third Circuit offers no relief at all.

To hold, as the Third Circuit does, that an exempt railroad is required by Section 10505(e) to remain liable

for loss or damage to shippers' freight but that it can then turn around and surcharge the shipper for the "cost of processing, defending and paying damage claims" (830 F.2d at 1233) effectively renders Section 10505(e) a dead letter. If the Third Circuit's holding on this point is not reversed, Congress' express preservation of Carmack Amendment liability for exempt railroads will have been written out of the Act. What rational shipper would ever file a loss or damage claim against an exempt railroad, knowing that if he wins, his damages *plus* the railroad's attorneys fees are likely to come out of his own pocket in the form of rate surcharges?[18]

The Third Circuit complains of a lack of authority for the proposition that railroads may not recover their costs, including costs of compensating shippers for loss and damage, in their rates. The likely explanation for the absence of cases on the unlawfulness of the kind of direct chargeback of G&T's damages through G&T's rates that Conrail has undertaken is that for one hundred years railroads were prohibited from discriminating and were subject to regulatory review of their rate increases. In any event, Conrail's practice appears to be legally indistinguishable from the old (and condemned) carrier practice of offering shippers a "choice" of a prohibitively high rate with full carrier liability for loss or damage, or a reasonable rate with limited or no liability. See *Co-operative Shippers Inc.*, *supra*, 613 F.Supp. at 790. See also *Fruitco Corp.* v. *Consolidated Rail Corp.*, 462 NYS 2d 754, 756 (N.Y. Civ. Ct. 1983), in which the court found 49

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[18] It is difficult to understand how the Third Circuit majority can say of G&T's court actions against Conrail for loss and damage that "[r]ecovery in those pending actions, or in any subsequently filed, will not be affected by the tariffs here challenged." (830 F.2d at 1233). The court could not be more wrong.

USC § 10505(e) to have been violated where the carrier refused the shipper's request for rates based on full Carmack Amendment liability, saying such rates would be prohibitively expensive. And while the last sentence of Section 10505(e) permits carriers to negotiate alternatives to full Carmack Amendment liability, such alternatives must be just that: options for a shipper to consider along with full liability. *Id. Accord, Yamazen USA* v. *Chicago and Northwestern Transportation Co.*, 790 F.2d 621, 623 (7th Cir. 1986).[19]

The Third Circuit cites in support of its holding the statement in Section 10505(e) that "[n]othing in this subsection or section 11707. . . shall give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707. . . ." (830 F.2d at 1233). However, G&T has not sought relief on this point from the Commission. It seeks instead to obtain enforcement in the courts of the terms of Section 10505(e).

In providing for exemptions in 49 USC § 10505, Congress included only two express protections for shippers. First, it specified in Section 10505(a)(2)(B) that the Commission may not issue an exemption if regulation is needed "to protect shippers from abuses of market power". Second, it provided in Section 10505(e) that an exempt railroad retains loss and damage liability consistent with 49 USC § 11707. The Third Circuit has now held that the shipper protection Congress mandated in Section 10505(e) may be evaded by the simple device of a rate surcharge to recover, from any shipper filing loss or damage

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[19] See also the Commission's own clarification of carriers' loss and damage liability obligations under Section 10505(e) in the context of exempt trailer on flat car (TOFC) transportation, *Ex Parte No. 230 (Sub-No. 5)*, 46 Fed. Reg. 32257 (June 22, 1981).

claims, the costs of "processing, defending and paying" his claims. Because this holding would render the carrier's historic duty of care a nullity for thousands of shippers (without even the limited recourse of an action at the ICC to revoke the exemption), and because it is inconceivable that this was Congress' intent, the Third Circuit's holding on G&T's Section 10505(e) claims cannot stand.

IV.

CONCLUSION

For the foregoing reasons, *Amici* National Small Shipments Traffic Conference, Inc. and Drug and Toilet Preparation Traffic Conference, Inc. urge this Court to grant G&T's Petition for Writ of Certiorari and to reverse the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G. & T. TERMINAL PACKAGING CO., INC.
and ANTHONY SPINALE,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether common law remedies are preempted with respect to rail rates for interstate traffic which the Interstate Commerce Commission has exempted from rate regulation under the Interstate Commerce Act, where Congress conferred exemption authority not only to remove federal regulatory controls but to obtain the benefits of competition, and where the Commission has continuing jurisdiction to revoke the exemption in whole or in part to protect a shipper from an abuse of market power.

2. Whether a rail carrier who increases its rates due to increased costs from loss and damage claims thereby violates Section 10505(e) of the Act, which requires carriers to offer contractual terms accepting liability for lost or damaged lading.

RULE 28.1 STATEMENT

Pursuant to Rule 28.1, Respondent Consolidated Rail Corporation ("Conrail") provides the following listing of its subsidiaries (except wholly-owned subsidiaries) and affiliates:

Akron and Barberton Belt Railroad Company
Albany Port Railroad Corporation
American Casualty Excess Insurance, Ltd.
Belt Railway Company of Chicago, The
Calumet Western Railway Company
Chicago and Western Indiana Railway Company
Indiana Harbor Belt Railroad Company
Lakefront Dock & Railroad Terminal Company
Monongahela Railway Company
Nicholas, Fayette & Greenbrier Railroad Company
Peoria & Pekin Union Railway Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
Railroad Association Insurance, Ltd.
Trailer Train Company
Transportation Data Xchange

Conrail has no parent company.

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MISCELLANEOUS:

H.R. Rep. No. 1035, 96th Cong. 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978. 13
H.R. Rep. No. 1430, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110 4,13-16
Interstate Commerce Commission, *1986 Annual Report* 18
48 Fed. Reg. 9276 (March 4, 1983) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1219

G. & T. TERMINAL PACKAGING CO., INC.
and ANTHONY SPINALE,

Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION

STATEMENT

A. The Parties

Conrail is a freight railroad operating in the northeast and midwest regions of the United States. Conrail's statutory mission is to provide adequate and efficient rail service in that region without the need for federal financing.[1]

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[1] The legislation relating to Conrail is the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985, as amended by the Railroad Revitalization and Regulatory Reform

Petitioner G. & T. Terminal Packaging Company is a potato repacker located in New York City. Petitioner Anthony J. Spinale is the President of G. & T. (Petitioners will be referred to collectively hereinafter as "petitioners" or as "G.&T.")

G.&T. receives some of its potatoes via Conrail at a terminal in New York City. Potatoes are shipped by rail from the western United States producing regions (California, Idaho and Washington) in refrigerated cars via western railroads and move to interchange points with eastern railroads. From these points, or "gateways," Conrail carries G.&T.'s potatoes to New York City.

B. The Regulatory Background

As a result of action by the Interstate Commerce Commission in 1980, railroad rates for transporting potatoes are exempt from rate regulation. The Commission's authority to grant such an exemption stemmed from legislation designed to revitalize the nation's railroads. In part because of intensive regulation, American railroads underwent a long period of economic decline which led to the collapse of ten large eastern and midwestern railroads (including the Penn Central) in the 1970's.[2] In the aftermath, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90

Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, and the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, tit. 11, subtitle E, 95 Stat. 357, 643 *et seq.* *See also* Conrail Privatization Act of 1986, Pub. L. No. 99-509, tit. 4, 100 Stat. 1874, 1892 *et seq.*

[2] *See generally Blanchette v. Connecticut Gen. Ins. Corps.* (*Regional Rail Reorganization Act Cases*), 419 U.S. 102, 108-09 (1974).

Stat. 31 ("4R Act"). Removal of federal regulatory controls was an important, though not the only, goal of the 4R Act. Among the express purposes of the 4R Act was to "permit railroads greater freedom to raise or lower rates for rail services in competitive markets." 4R Act, § 101(b)(3).

Congress was not satisfied with the railroads' uncertain progress toward physical rehabilitation, competitive efficiency and financial health under the 4R Act. Congress followed the 4R Act with the comprehensive deregulatory revisions that came to be known as the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. In enacting the Staggers Act, Congress found that "today, most transportation within the United States is competitive," in contrast with 1887 when the enactment of the Interstate Commerce Act had been "essential to prevent an abuse of monopoly power . . . ." *Id.*, §§ 2(2), (3), *reprinted in* note to 49 U.S.C. § 10101a (1982). Congress also found that the railroads were facing a huge capital shortfall. *Id.*, §§ 2(6)-(7). Both in its comprehensive national rail transportation policy ("NRTP") and in its substantive provisions, the Staggers Act is pervaded by the goal that where there is competition, the market rather than regulation be allowed to set rail rates. *See, e.g.*, 49 U.S.C. §§ 10101a(1), (2), (4), (5), (6), 10701a (1982). The goals of the Staggers Act are not only "to reform Federal regulatory policy," § 3(2), but to assist the railroads, through competition wherever possible, "in rehabilitating the rail system" and in remaining "viable in the private sector of the economy." *Id.* §§ 3(1), (3).

Broadening an exemption authority previously conferred by the 4R Act, Congress directed the Com-

mission in the Staggers Act to exempt a person, class, transaction or service whenever the Commission finds that application of a provision or provisions of the Act is not necessary to carry out the NRTP and either regulation is not necessary to protect shippers against abuse of market power or the transaction or service is of limited scope. 49 U.S.C. § 10505(a) (1982). The Commission may revoke an exemption whenever necessary to carry out the NRTP. *Id.* § 10505(d). The Commission may fine-tune the extent of revocation "to the extent it specifies" with respect to the "person, class or transportation" as to which "a provision" of the Act is to apply. *Id.*

In addition to strengthening the Commission's exemption authority, Congress by statute exempted from regulation rates for rail transportation as to which the carrier is not "market dominant." As to such traffic, a rail carrier may charge "any rate" that is not unreasonably low. 49 U.S.C. §§ 10701a(a), (b), (c) (1982).

Exercising the 4R Act exemption authority in early 1980, the Commission exempted a number of agricultural commodities, including potatoes.[3] Ex Parte No. 346 (Sub-No. 2), *Rail General Exemption Authority—Miscellaneous Commodities* (served March 24, 1980) (reproduced in Resp. App. A) (hereinafter, "*Potato Exemption Decision*"). The Commission concluded that "intra- and intermodal competitive forces in this market exist to restrain monopoly pricing and provide

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[3] The Staggers Act continued in effect exemptions issued under the 4R Act. H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110, 4137 ("Conference Rept.").

alternatives in the event of possible discrimination." *Id.* at A-11. The Commission found that, even on a regional basis, "the rail market share does not exceed traditional standards indicating market power and a lack of effective competition." *Id.* at A-10, A-11 (footnote omitted).

G.&T. never sought judicial review of the Commission's decision to exempt rail transportation of potatoes. It has never petitioned the Commission to revoke the exemption in whole or in part.

C. The Controversy Between The Parties And The Proceedings In The District Court

Conrail decided in June of 1983 to increase its charges for the transportation of G.&T.'s potatoes to reflect more accurately the actual total costs to Conrail of serving G.&T. These costs reflected numerous claims for loss and damage by G.&T. against Conrail.

Nearly a year after Conrail increased the rates, petitioners filed the instant lawsuit. Petitioners alleged a cause of action under common law on the basis that Conrail's increased rates constituted unreasonable discrimination (the "common law claim"). They also claimed that Conrail's charges violated Conrail's duty under the Interstate Commerce Act to offer contractual terms under which Conrail would be liable to G.&T. for lost or damaged lading (the "statutory claim").[4] *See* Pet. App. 10a-11a.

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[4] Petitioners also raised a constitutional and an antitrust claim. Petitioners' antitrust claim was dismissed voluntarily, with prejudice. The district court rejected their constitutional claim and the court of appeals affirmed. Petitioners do not seek review of either of these claims.

The district judge to whom this case had been initially assigned denied Conrail's motion for summary judgment with respect to petitioners' common law claim. Conrail thereafter sought a declaratory order from the Commission that the Commission continued to have jurisdiction with respect to traffic, such as petitioners', which the Commission had exempted from the Interstate Commerce Act; that the remedies of that Act with respect to exempt rail transportation are exclusive; and that common law does not apply to interstate rail rates for exempted traffic. The Commission's declaratory order, discussed below, confirmed Conrail's position in all respects.

Conrail thereafter renewed its motion for summary judgment. In the interim, the case had been reassigned to another district judge, who granted Conrail's renewed motion for summary judgment.

D. The Commission's Declaratory Order

The Commission, in its declaratory order, agreed with Conrail:

> "We conclude that we do retain jurisdiction over movements exempted under Section 10505 and that our jurisdiction over rail rates and practices of the sort involved in the present dispute is exclusive. There is no surviving common law cause of action."

Consolidated Rail Corp.—Declaratory Order—Exemption, 1 I.C.C.2d 895 (1987), Pet. App. 151a. The Commission pointed out that "[i]f another body were allowed to replace the regulatory restrictions dismantled at the Commission, the agency's exemptive actions would be nugatory." Pet. App. 156a-157a. Emphasizing its continuing responsibilities with re-

spect to exempt traffic, the Commission stressed that "[t]he potential for total or partial reimposition of regulation is always present." Pet. App. 155a. Indeed, the "revocation power is one of the central features of Section 10505." *Id.* The Commission confirmed that "the only recourse of an aggrieved shipper such as G.&T. is to seek a revocation of the applicable exemption, at least as to its shipments." *Id.* at 160a.

G.&T. participated in the declaratory order proceedings before the Commission, but did not seek judicial review of the Commission's order.

E. The Decision Of The Court Of Appeals

The court of appeals affirmed the district court's grant of Conrail's motion for summary judgment with respect to G.&T.'s common law and statutory claims. Pet. App. 1a *et seq.*; 830 F.2d 1230.

1. The common law claim.

The court of appeals held that neither the text nor the legislative history of the 4R Act or the Staggers Act "suggests a Congressional intention to resurrect common law remedies moribund since 1907." *Id.* at 15a. The court relied on express language to the contrary in Section 10501(d), *see* note 11, *infra*, which made "clear that the only remedies regarding rail rates are those provided by federal statutes . . . ." *Id.* at 16a. The court further held that G.&T.'s position would be "inconsistent with the statutory scheme." *Id.* at 17a. "Recognition of a common law remedy with respect to rates would have the effect of substituting a court's regulation for the Commission's decision in favor of deregulation." *Id.* at 18a.

The dissenting judge thought that "[i]f Congress had intended to remove the common law remedy, it

would have done so plainly and said so clearly." *Id.* at 45a.

2. The statutory claim.

The court of appeals ruled unanimously that Conrail had not violated Section 11707 of the Act by increasing its rates to G.&T. "[T]he shippers cite no authority—statutory, regulatory, or judicial—for the proposition that carrier liability under section 11707 is not a cost which may be taken into account in fixing rates." *Id.* at 11a.[5]

ARGUMENT

I. REVIEW BY THIS COURT IS UNWARRANTED WITH RESPECT TO PETITIONERS' COMMON LAW CLAIM

A. The Decision Below Is Not Of Major Importance.

Eighty-one years ago, this Court held that the Interstate Commerce Act repealed by implication the common law right of a shipper to recover damages from a rail carrier because of an unreasonable interstate rate. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 436, 437 (1907). That has been the law ever since. The decision below leaves undisturbed the exclusivity of the Interstate Commerce Act with respect to interstate rail rates that has been in place for eighty years. The decision introduces no new element into shipper-carrier relations, and disturbs no settled expectations.

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[5] G.&T.'s timely petition to the court of appeals for rehearing with a suggestion of rehearing en banc was denied. Pet. App. 48a.

The decision below is the only federal appellate court decision on the question whether the common law governs interstate rail rates on exempt traffic. The Commission has had exemption authority for twelve years; the question whether the common law governs exempt rail transportation in any aspect has arisen only infrequently; and each of the lower courts that has addressed the question has answered it in the same way. *See* p. 11, *infra*. The decision below simply reaffirms the general understanding that rate relief must come from the Commission and not the courts, and that shippers unhappy with an exemption must invoke the express statutory remedy of revocation.

Petitioners seek review of the question whether common law applies to exempt traffic on the apparent assumption that they would have no retroactive damage remedy in the event the Commission revokes the exemption. *See* Pet., *passim*. The court of appeals explicitly stated, however, that it was not deciding whether the Commission could award damages for discriminatory prices charged during a period of exemption; the answer to that issue would not affect its conclusion. Pet. App. 21a.[6] Thus, the question petitioners seek to raise is not squarely presented in this case.[7]

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[6] The dissenting judge in the court below addressed this issue, stating that the Commission "would have no power to award damages for discriminatory rates charged" during an exemption period. *Id.* at 35a-36a.

[7] Further, in order to reach the question presented by G.&T., the Court would have to resolve a serious jurisdictional issue argued by Conrail below, *see* Brief for Appellee, 18-19, but not addressed by the Court of Appeals. G.&T. participated in the

Amici assert that the decision will affect numerous shippers whose traffic has been exempted. Amici Br. 8-9. But that could be said of any decision on a legal question involving the Commission's exemption authority. The Court has in fact consistently denied certiorari in cases involving the Commission's exemption authority, including the question whether states must apply Commission exemptions with respect to *intra*-state rail transportation. *See Illinois Commerce Comm'n v. ICC*, 749 F.2d 875 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 820 (1985); *see also Coal Exporters Ass'n v. United States*, 745 F.2d 76 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985); *Brae*

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declaratory order proceeding at the Commission, which involved the same legal issue and parties, and arose out of the same transactions, as G.&T.'s district court action. G.&T. never sought judicial review of the Commission's declaratory order. That order has "like effect as in the case of other orders," 5 U.S.C. § 554(e) (1982); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 372 n.3 (1969). Accordingly, the Commission's order is reviewable only in a review proceeding under the Hobbs Act, 28 U.S.C. §§ 2321 *et seq.* (1982). For a district court to entertain G.&T.'s common law claim would be in effect to set aside the Commission's declaratory order. There is a serious question whether G.&T.'s common law claim is an impermissible collateral attack on the Commission's declaratory order. *See Port of Boston Marine Term. Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-72 (1970) (shipowner that had full opportunity to participate in Federal Maritime Commission proceeding and failed to file timely appeal to court of appeals could not collaterally attack Commission determinations in district court action); *Venner v. Michigan Cent. R.R.*, 271 U.S. 127, 130-31 (1926) (district court had no jurisdiction over suit that "is essentially one to annul or set aside the order of the Commission"); *see also B.F. Goodrich Co. v. Northwest Indus., Inc.*, 424 F.2d 1349, 1352-54 (3d Cir.), *cert. denied*, 400 U.S. 822 (1970); *Pullman-Standard v. ICC*, 705 F.2d 875, 878-80 (7th Cir. 1983).

Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985).[8]

B. There Is No Conflict Between The Decision Below And Any Decisions Of This Or Any Other Court.

The principle confirmed by the court of appeals had previously been applied by two district courts, each of which referred to the Commission's Declaratory Order in this case. *See Alliance Shippers, Inc. v. Southern Pac. Transp. Co.*, 673 F. Supp. 1005 (C.D. Cal. 1986) (rejecting common law claim of rate discrimination on exempt traffic); *Pittsburgh Terminal Corp. v. Baltimore & O. R.R.*, No. C84-1267 (N.D. Ohio Sept. 25, 1986) (reprinted in Resp. App. B) (rejecting common law challenge to an exempted operating agreement). Conrail is not aware of any decision to the contrary.

Unable to find a conflict, petitioners incorrectly assert that the decision below is "counter the reasoning" [sic] in prior decisions of this Court. Pet. 26. Petitioners rely on *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), where the Court distinguished *Abilene Cotton*. On its merits, the question G.&T. seeks to present turns on the language and policies of the Staggers Act, not on a direct application of *Abilene Cotton*.[9] In any event, there is no inconsis-

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[8] In *ICC v. Texas*, ___ U.S. ___, 107 S. Ct. 787 (1987), the Court granted certiorari and reversed a Fifth Circuit decision that would have limited the Commission's exemption authority in favor of state regulation.

[9] The *Abilene Cotton* result—the displacement of the common law—is part of the history in light of which Congress acted. As of 1980, the governance of interstate rail rates had not been part of the police powers of the states for almost eighty years.

tency between *Nader* and the decision below. In *Nader* the Court was not "called upon to substitute its judgment for the agency's on the reasonableness of a rate—or, indeed, on the reasonableness of any carrier practice." 426 U.S. at 299-300. In the instant case, by contrast, G.&T.'s claim that the common law should substitute for the market as the regulator of rates is squarely inconsistent with determinations by Congress and the Commission that the market would produce reasonable rates for agricultural commodities.[10]

Petitioners also contend that the decision below is incompatible with the reasoning of *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U.S. 92 (1901). *See* Pet. 17-18, 20-21. There the Court was unwilling to hold "that in the absence of congressional action there are no restrictions on the power of interstate carriers to charge for their services." Quoted in Pet. 18, 20. In this case, however, there is "congressional action" with respect to Conrail's rates on exempt traffic, namely the NRTP, and the statutory exemption and revocation authority.

C. The Decision Below Is Correct.

In the Staggers Act, "Congress unambiguously expressed its interest in allowing free competition, to the maximum extent possible, to govern the financial

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[10] Plaintiff in *Nader* claimed that he was entitled to accurate representations about airline bumping practices—whatever they might be. That claim posed no threat of inconsistency with whatever the Civil Aeronautics Board ("CAB") might allow in the way of bumping practices. Congress had made no determination that the market or the CAB should govern misrepresentation; allowing a court to do so posed no inconsistency.

health of the railroad industry." *ICC v. Texas*, *supra*, 107 S. Ct. at 793. A "cornerstone" of this policy is the Commission's exemption authority. H.R. Rep. No. 1035, 96th Cong. 2d Sess. 60, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4005. Petitioners seek a result which, the Commission has determined, would render that authority "nugatory." Pet. App. 156a-157a. Petitioners' common law claims would be inconsistent with eighty years of history, express preemption language, legislative history explicitly rejecting common law claims, and central policies that are part of the statute itself.

1. Petitioners Ignore Express Preemption Language

Congress accompanied the deregulatory provisions of the Staggers Act with an express declaration that the remedies of the Interstate Commerce Act with respect to rail rates and practices, and the jurisdiction of the Commission over rail transportation, are exclusive.[11] (Revocation of an exemption in whole or in part is one such statutory remedy.) Petitioners *never* address the express preemption language of Section 10501(d).[12] As Congress took pains to emphasize: "No

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[11] "The jurisdiction of the Commission . . . over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive." 49 U.S.C. § 10501(d). Whatever grammatical uncertainty there may be in this language is dispelled by the explanation in the Conference Report that the remedies in the Act, and the jurisdiction of the Commission over rail transportation, "are exclusive." Conference Rept. at 106.

[12] *Amici* attempt to construe § 10501(d) in a way that is "consistent with the rule against implied abrogation of common law remedies . . . ." Amici Br. 10. Any rule against implied abrogation is irrelevant in construing § 10501(d), which is an express

state law or federal or state common law remedies are available." Conference Rept. at 106.[13] Even with respect to intrastate traffic, Congress had by 1980 concluded that there could not be different substantive state regimes when such transportation is provided by interstate carriers. *See* 49 U.S.C. § 11501(b).[14]

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preemption provision. Further, *amici* contend that "Commission jurisdiction preempts common law remedies only so long as that jurisdiction is exercised . . ., but not when that jurisdiction is surrendered." Amici Br. at 10-11. But the exclusivity of the statutory *remedies* is not tied in § 10501(d) to the exclusivity of the Commission's *jurisdiction*; each is stated to be exclusive. Also, the concept of "surrendered" jurisdiction reflects a misunderstanding of the Commission's continuing jurisdiction with respect to exempt rail transportation. *See infra*, pp. 16-17, 20 & note 23.

[13] In an amendment designed to conform to § 10501(d), Congress in the Staggers Act amended the existing clause saving common law claims (the same clause which the Court in *Abilene Cotton* held did not allow the application of common law), so that it now reads as follows: "*Except as otherwise provided in this subtitle*, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law." 49 U.S.C. § 10103 (emphasis added of Staggers Act amendment). *See* Conference Rept. at 106. The court of appeals properly found that § 10501(d) "is precisely the type of exception contemplated by the [amended] savings provision." Pet. App. 16a-17a.

[14] *See Illinois Commerce Comm'n v. ICC*, *supra*, 749 F.2d at 883, 884 ("[i]n view of the overriding importance of the exemption provisions," and because continued state regulation even of intrastate transportation "would frustrate federal deregulation efforts pursuant to an exemption order," states must give effect to federal exemptions of intrastate transportation).

2. The National Rail Transportation Policy Is Not Only To Reduce Federal Regulation But To Obtain The Benefits Of Competition

When the Commission exempted rail transportation of potatoes, it expressly found that "competitive forces in this market exist to restrain monopoly pricing and provide an alternative in the event of possible discrimination." *Potato Exemption Decision*, Resp. App. A-11. Where there is competition, market forces will produce efficient rates and (what amounts to the same thing) discrimination will be disciplined to the degree and in the ways that are efficient.[15]

Congress adopted pro-competitive measures with specific goals in mind; it was not indifferent to what happened to the nation's railroads after deregulation. The railroads' economic strength and ability to compete remains "a subject of deep federal concern." *Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board*, 474 U.S. 409 (1986).[16] As with the exempt

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[15] Congress expected the Commission "to exercise its remaining power under § 10741 [the discrimination provision] only where it is needed to prevent abuses of market power where discrimination cannot be justified by differences in demand . . . or costs." Conference Rept. at 104.

[16] As with the regulation of natural gas, comprehensive, preemptive federal regulation of railroads long antedated the deregulatory statute. Even more clearly than did the act at issue in *Transco*, the Staggers Rail Act embodies an affirmative congressional intent that "price . . . be determined by market forces," *Transco*, *supra*, 474 U.S. at 422. The issues presented in this case therefore are not comparable to those currently being considered by the Court in *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, No. 86-1406 (petition for *certiorari* granted Oct. 5, 1987). *Isla* involves an area in which the states traditionally could regulate prices through the police

natural gas at issue in *Transco*, the exemption authority in the Staggers Act "does not constitute a federal retreat from a comprehensive . . . policy." *Id.* at 421. To the contrary, the exemption provisions were accompanied by a new comprehensive statement of national policy (the NRTP) relating specifically to railroads. *See* 49 U.S.C. § 10101a.

The NRTP is not simply the removal of federal controls. It is, *inter alia*, "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail," and to "allo[w] rail carriers to earn adequate revenues." 49 U.S.C. §§ 10101a(1), (3). By allowing the rail industry to achieve the efficiencies of competition, Congress hoped to avoid a choice between countenancing further physical deterioration and financial instability of the railroads, or massive new federal subsidies. *See* Staggers Act, §§ 2(6)-(8). "[T]o minimize the need for Federal regulatory control" is a *separate* policy goal. 49 U.S.C. § 10101a(2). (Application of the common law could well frustrate even this separate policy by creating a renewed "need" for Federal regulation.)

Congress' expectation was that the Commission would use the exemption authority vigorously and then "revie[w] carrier actions after the fact to correct abuses of market power." Conference Rept. at 105. Thus, the Commission was charged with actively monitoring exempt traffic to ensure the realization of the

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power, which is not true of interstate rail rates. And *Isla* involves preemption of state law upon the expiration of a federal regulatory scheme, whereas this case (like *Transco*) involves Congressional revision of an ongoing, comprehensive scheme of regulation.

NRTP. As the Fifth Circuit has observed, the Commission's revocation authority gives railroads "a strong incentive not to engage in . . . abuses of their market power." *American Trucking Ass'ns v. ICC*, 656 F.2d 1115, 1123 (5th Cir. 1981).[17]

3. Petitioners' Common Law Claim Cannot Be Reconciled With The National Rail Transportation Policy Or With The Exemption Provisions Of The Act

Petitioners' common law claim cannot be reconciled with the goals and policies of the Staggers Act. By awarding damages, a court would be setting a rate retroactively. By enjoining a rate, a court would be barring, and perhaps fixing, a rate prospectively. In either case, courts rather than competition would be establishing rates. Any court would have to second-guess the determinations of Congress and the Commission that competition will produce reasonable rates. "Surely Congress would not have meant its silence alone to imply the revival of a judicial remedy the exercise of which might well defeat rather than promote the objectives of the National Transportation Policy." *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 673 (1963).

Applying common law to exempt traffic would frustrate the exemption provisions as well. The Commission has used the exemption authority to promote capital flow into the rail industry,[18] to facilitate op-

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[17] Because the Commission can tailor a revocation "to the extent it specifies," 49 U.S.C. § 10505(d), the Commission would have authority, on a proper factual showing, to revoke the exemption solely as to transportation of potatoes to G.&T.

[18] *See, e.g.*, exemptions relating to issuance of most securities by railroads, 49 C.F.R. § 1175.1 (1987); certain mergers and

erating efficiencies,[19] and to enable newly formed "short-lines" to acquire and maintain in rail service branch lines of major carriers that were slated for abandonment.[20]

If G.&T.'s common law claim were to be allowed, the Commission's vigorous use of the exemption authority would become largely pointless. Exemption would represent a liability rather than an opportunity. Exemption would expose the exempted traffic to limitations more restrictive, less uniform, less informed, and less predictable than regulation under the Interstate Commerce Act.[21] A single state's peculiar interpretation of the common law could impose substantial burdens on interstate commerce. Exemption could no longer be of utility in such often time-sensitive transactions as acquisitions and issuance of securities. Rate flexibility—a key to competitive vigor—would be

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transfers of control, *id.*, § 1180.2(d); and acquisition of rail property by non-carriers, *id.*, § 1150.31.

[19] *See, e.g.*, certain exemption of certain operating agreements and grants of trackage rights, *id.* § 1180.2(d).

[20] *See, e.g.*, ICC, *1986 Annual Report* at 51; *Knox & Kane R.R. Co.—Petition for Exemption*, 366 I.C.C. 439 (1982).

[21] Even prior to the Staggers Act, this Court affirmed a district court decision that state authority over interstate rates is preempted with respect to transportation that Congress exempted from regulation, which exemption is subject to revocation by the Commission when "necessary to carry out the National Transportation policy." *Public Util. Comm'n v. Baltimore Shippers & Receivers Ass'n*, 389 U.S. 583 (1968), *aff'g* 268 F. Supp. 836, 844 (N.D. Cal. 1967) (three-judge court) ("the comprehensive regulatory scheme of the Interstate Commerce Act . . . and the nature of the subject matter sought to be regulated require a finding that the field has been pre-empted by federal regulation").

chilled. The Commission thus correctly concluded that subjecting exempt traffic to common law claims would render the exemption authority nugatory. *See* Pet. App. 156a-157a.

G.&T.'s claim cannot be reconciled with the Act regardless whether the content of its asserted reasonableness standard is identical to or different from the rate provisions of the Act. If the reasonableness standard is different, the balances struck by Congress will be disturbed, and some element of national policy will be frustrated (whether the alteration would be to the benefit of railroads or shippers is irrelevant).

If the common law standard adopted the rate provisions of the Act *in toto*, the court proceeding would be a shadow agency proceeding. The common law would constrain railroads' behavior as if they continued to be regulated. The only effect of an exemption would be to transfer jurisdiction to apply the market dominance and other statutory rate provisions from the ICC to the courts. There is no conceivable reason why Congress would have intended such a result. The Act simply leaves no room for a different substantive regime to be applied to rail transportation. This is as true with respect to exempt traffic as any other.[22]

Seeking to distinguish *Abilene Cotton*, petitioners assert that there is "neither a regulatory nor a judicial remedy for unjust discrimination" because "there is no regulatory scheme" with respect to ex-

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[22] The express exclusivity provisions of the Staggers Act, the long history of preemption, and the specific purpose to achieve financial viability in a particular industry through the mechanisms of competition, all distinguish the Staggers Act from the Sherman Act. *Cf. Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

empt traffic. Pet. 22, 23. But there is a regulatory remedy—the remedy of revocation, and that remedy is part of a regulatory scheme under which the Commission is empowered to reimpose regulation when necessary to achieve the NRTP.[23] Petitioners' real complaint is that they do not like the regulatory remedy, but that is a matter for Congress. Petitioners ask the Court to supplement Congress' judgment on

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[23] At the conclusion of its potato exemption decision, the Commission stated that "[n]othing in this exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section." Resp. App. A-16. *See* 49 C.F.R. § 1039.10 (1987). If particular problems arise under the exemption, "the appropriate remedy is a petition for revocation or modification" of the exemption. Resp. App. A-12.

In an action that would aid the remedy of revocation or modification, the Commission required carriers to continue to comply with accounting and reporting requirements under the Act, and to maintain copies of rates, charges, rules or regulations for traffic moving under the exemption. *Id.* at A-12, A-13. Originally time-limited, *id.* at A-17, these requirements were subsequently made permanent. *See* 48 Fed. Reg. 9276, 9277 (March 4, 1983); 49 C.F.R. § 1039.10 (1987).

The dissenting judge in the court of appeals understood (erroneously, *see* note 17, *supra*) the shipper's revocation remedy to consist only of the right "to petition the ICC to withdraw its exemption and restore regulation of the *entire* railroad industry's transportation of potatoes." *Id.* at 33a (emphasis added). Such a remedy is wanting, the dissent said, because, in addition to having to show the need for re-regulating the entire industry, the shipper would have the burden of "overcoming . . . legislatively-declared public policy." *Id.* at 34a. Because the Commission would apply legislative policy, the proceeding "would not take place in a judicially-neutral ambience," *id.* at 34a-35a (in which, apparently, a court would be free to ignore "legislatively-declared public policy").

remedial issues. But "the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).[24]

4. Petitioners' Asserted Distinction Between Administrative Regulation And Judicial Application Of Common Law Is Unavailing

Apparently recognizing the force of the objections to their common law claim, petitioners attempt to distinguish state "regulation" by an administrative agency from a judicial "tort remedy." Pet. 26. *Amici* attempt to distinguish the state ratable take provision in *Transco* in the same way. Amici Br. 10.

These purported distinctions are unavailing. Common law rate actions in court would, if anything, be more disruptive of national policy than agency regulation, for all of the manifold reasons that led to the creation of administrative agencies and the enactment of regulatory statutes in the first place. This Court long ago recognized that the power of a state to regulate business by statute is not more extensive in the federal scheme than its power to do so by common law:

> "The controlling fact is the power to regulate at all. . . . In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. . . .

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[24] *Cf. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate").

> "[T]he common law . . . is only one of the forms of municipal law, and is no more sacred than any other."

Munn v. Illinois, 94 U.S. 113, 134 (1877); *see also Adams Express Co. v. Croninger*, 226 U.S. 491, 505-06 (1913).[25]

5. Petitioners' Invocation Of Federal Common Law Is Unavailing

Apparently recognizing that application of state common law would preclude uniformity, petitioners contend that their claim is based on federal as well as state common law. *See* Pet. 19; Amici Br. 10, 11. The contention is useless. The presumption is against federal common law. *Milwaukee v. Illinois*, 451 U.S. 304, 312-17 (1981). Federal common law in respect of non-constitutional questions can exist only when the questions at issue cannot be answered from federal statutes. *Id.* at 313-15; *see also D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469-70 (Jackson, J., concurring), *reh'g denied*, 315 U.S. 830 (1942). The rate, exemption and revocation provisions of the Act amply answer the issues raised by G.&T. Even were that not the case, any federal common law would be required to apply the policies of the relevant federal statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *D'Oench, Duhme & Co. v. FDIC*, *supra*, 315 U.S. at 471-72. The very application

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[25]In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Court held that the Interstate Commerce Act preempted damage claims under Iowa common law and the Iowa Code. That the claim involved common law, not administrative regulation, occasioned no special analysis or comment. *See also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 580 (1981).

of common law would, however, contradict the national rail transportation policy set forth in the statute.

II. REVIEW BY THIS COURT IS UNWARRANTED WITH RESPECT TO PETITIONERS' STATUTORY CLAIM

G.&T. contends that Conrail's rate increases "deprived G.&T. of its legal right to pursue claims" for loss and damage to cargo under the Act. Pet. 27. All of the judges in both of the lower courts who considered this contention rejected it. Their decision also is not in conflict with any other decision. Indeed, petitioners' assertion is, by their admission, "novel." Pet. 28. Petitioners offer no reason why their statutory claim should be reviewed in this Court.

The decision below was correct. The statutory language expressly negates petitioners' claim of deprivation of statutory right. Section 10505(e) provides that "[n]othing in this subsection or section 11707 of this title shall . . . give the Commission the authority to require any specific level of rates or services based upon the provision of section 11707 of this title." As the court of appeals correctly held, "Section 11707 prohibits rail carriers from relieving themselves of the cost of paying loss or damage claims; it simply does not deal with what costs may be taken in account in determining rates." 830 F.2d at 1233; Pet. App. 11a-12a.

Section 10505(e) authorizes rail carriers to do precisely what Conrail did—take into account the cost of defending against and paying liability claims in setting rates for exempt traffic. A competitive carrier has incentives to minimize such costs. Nevertheless, de-

fending and paying such claims is a cost of doing business that will be incurred by even the most efficient rail carrier, and it would be irrational *not* to charge rates that recovered those costs.[26]

Amici argue that Section 10505(e) deprives only the Commission, but not the courts, of authority to regulate rates. Amici Br. 16. The logical reading of that subsection, though, is that Congress referred only to the Commission because it intended the Commission to be the only body with authority over rail rates and practices. The suggestion that Congress intended, by denying a regulatory power to the Commission, to grant even broader power to the federal courts finds no support in the statute, and is contrary to *Milwaukee v. Illinois*, *supra*.

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[26] If a rail carrier had sufficient market power to recover from shippers an inefficient level of liability (or other) costs, the ICC could revoke the exemption. *Cf.* 49 U.S.C. §§ 10101a(6), (13).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 14, 1988

APPENDIX

APPENDIX

A. Interstate Commerce Commission, Ex Parte No. 346 (Sub-No. 2), *Rail General Exemption Authority—Miscellaneous Commodities* (March 21, 1980).

B. *Pittsburgh Terminal Corp. v. Baltimore & O. R.R.*, Case No. C84-1267 (N.D. Ohio, Sept. 25, 1986).

C. Text of Statutory Provisions Involved.

INTERSTATE COMMERCE COMMISSION

DECISION

EX PARTE NO. 346 (Sub-No. 2)

RAIL GENERAL EXEMPTION AUTHORITY— MISCELLANEOUS COMMODITIES

Decided: March 21, 1980

In the Notice in this proceeding, dated March 21, 1979 [published at 44 Fed. Reg. 18711 (1979)], we proposed to exempt, under authority of 49 U.S.C. § 10505, certain miscellaneous commodities from the provisions of Subtitle IV of Title 49. The proposed exemption consists of consolidated requests by parties to the Ex Parte No. 346 (Sub-No. 1) proceeding (decision served March 22, 1979) which exempted the rail transportation of fresh fruits and vegetables. The commodities, by Standard Transportation Commodity Code (STCC) number, are:

01 143 Peanuts

01 194 Potatoes, sweet

01 195 Potatoes, other than sweet

01 232 Bananas

01 294 Cocoa beans

01 295 Coffee, green

01 916 Mushrooms, fresh

09 1 Fresh Fish or other Marine Products

Also included in the list of proposed commodities are: 01 341 Beans, dry ripe; 01 342 Peas, dry; and 01 343 Cowpeas, lentils or lupines. These three commodity groups, although originally exempted in the Sub-No. 1 decision, were excluded from the fresh fruit and vegetable exemption on appeal, 361 I.C.C. 374 (1979), for further examination in this proceeding.

Issues which we proposed to address and for which we solicited comments were:

(1) whether a complete exemption from regulation is warranted for these commodities, based on the criteria of section 10505;

(2) whether a partial exemption from certain statutory provisions is preferable for any of these commodities;

(3) whether any exemption should be nationwide in scope, or should exclude any geographic or product sub-markets;

(4) the particular effects on railroads, shippers, or distinct market areas of any exemption which excludes some geographic or product sub-markets.

In addition, in the appeal to the Sub-No. 1 decision, we indicated that we would further consider the question of the treatment of mixed shipments of exempt and nonexempt commodities and determine if an exemption on this traffic is warranted, 361 I.C.C. at 376.

Procedural Matters

The appeal to the Sub-No. 1 decision extended the due date for comments in this proceeding to June 27, 1979. Sunkist Growers, Inc., filed comments on July 19, 1979, and the Atchison, Topeka, and Santa Fe Railway System (AT&SF) submitted comments in response to Sunkist's submission on August 20, 1979. Southern Pacific Transportation Company also submitted on August 7, 1979, a motion to strike the comments of Sunkist or, in the alternative, to accept their reply to Sunkist's statement. In addition, the Office of Rail Public Counsel (ORPC) filed supplementary comments on August 13, 1979. Although late filed, we will accept these comments including Southern Pacific's reply, for consideration. We do not believe

this will prejudice the interest of any parties to the proceeding and it will develop the record to enable us to reach an informed decision.

Standard for Exemption

The statute authorizes the exemption of a person or class of persons, or transaction or service of limited scope, from the provisions of Subtitle IV of Title 49, when continued regulation: 1) is not necessary to carry out the transportation policy; 2) would be an unreasonable burden on a person, class of persons, or interstate and foreign commerce; and 3) would serve little or no useful public purpose.

In Ex Parte No. 346 (Sub-No.1), we interpreted the statutory language to require that in the case of transactions or services, a finding that the above three criteria are met must be predicated on the limited scope of the transaction or service to be exempted. In the fresh fruit and vegetable exemption, we found that the railroads' share of the available market was limited in scope (less than 10 percent) and that *in that case* their minimal participation alone established the remaining statutory criteria. We noted that while a showing of limited market shares is *not* a prerequisite to a grant of exemption, it obviously bears some relevance to the inquiry. Petitioners were encouraged to provide whatever evidence is relevant to show how the particular service or transaction is limited in scope and establishes the remaining criteria. We committed ourselves for the future not to be limited by any rigid formula, but instead to examine exemptions on a case-by-case basis.

Commodities Covered Under This Exemption

The commodities under consideration in this proceeding were not exempted from regulation in Ex Parte No. 346 (Sub-No. 1) for various reasons. Bananas, cocoa beans, green coffee, dry beans, dry peas, and lentils were orig-

inally included in the list of commodities under fresh fruits and vegetables. In the case of bananas, cocoa beans and green coffee, these commodities were placed in this proceeding to consider further the effect of a rail exemption on commodities which are not exempt when moving by motor carrier. Dry beans, dry peas, and lentils were excluded on appeal in Sub-No. 1, to be further considered here in response to allegations that a similarity in transportation characteristics to grain and grain products, which were specifically excluded in the Notice of Proposed Exemption in Ex Parte No. 346 (Sub-No. 1), warrants similar treatment for these commodities. The remaining commodities exceeded the scope of the Sub-No. 1 notice. To provide interested persons the opportunity to comment and so as not to delay the effective date of the fresh fruit and vegetable exemption, we instituted this Sub-No. 2 proceeding to consider an exemption for these miscellaneous commodities.

Initially, we note that nothing in the statutory language precludes the rail exemption of commodities which are not exempt when moving by other modes.[1] It was argued in Ex Parte No. 346 (Sub-No. 1) that the rail transportation of bananas, cocoa beans and green coffee should not be exempt because, unlike other fresh fruits and vegetables, these commodities are not exempt when moving by motor carrier. While it is true that the motor carrier agricultural exemption was found to constitute an undue burden on the railroads, this was only partial justification for the fresh fruit and vegetable exemption. There were other agricultural commodities within the motor carrier exemption, for example, grain, which were not included in the fresh fruit and vegetable exemption because the record in that proceeding did not support the requisite statutory findings for exemption. Thus, the fresh fruit and vegetable exemption did not precisely parallel the motor carrier ex-

[1] But see, H. R. Rep. No. 94-725, 94th Cong., lst Sess. 75 (1975).

emption and the existence of the latter was not a prerequisite for that rail exemption. We reject the argument that the absence of a motor carrier exemption for the transportation of bananas, cocoa beans and green coffee forecloses a rail exemption for these commodities. Any commodity may be exempted so long as the statutory criteria are met.

Similarly, merely because commodities proposed for exemption exhibit transportation characteristics which are similar to non-exempt commodities does not preclude their exemption. Several parties, including the United States Department of Agriculture (DOA), the National Dry Bean Council and AT&SF, take the position that dry beans, dry peas, and lentils should not be exempted in this proceeding because of the alleged similarity between these commodities and grain. The railroads commenting on this issue minimize the similarity in transportation characteristics to grain. They state that pricing and marketing considerations are less complex than and different from those of grain, that these commodities do not move in covered hoppers to as great an extent as grain, and that rail participation in this traffic has declined despite increasing bean production in recent years. This reasoning is compelling. Furthermore, we conclude that the similarity or dissimilarity between beans and grain is not the key issue on exemption. It is within the discretion of the Commission, limited only by the statutory criteria, to determine which commodities to exempt. Each commodity will be judged on its own merits, rather than by association with some other commodity or group.

Looking then to the merits of the proposed exemption we find that an exemption is warranted for all of the commodities embraced in this sub-proceeding. While the rail market share for each of the commodity groups varies, in no instance are the available nationwide figures more than limited in scope. Some of the commodities, bananas, cocoa beans, green coffee, dry beans, dry peas, and lentils,

were originally included in the fresh fruit and vegetable proposal and, thus, are within the less than 10-percent market share figure which justified the exemption in that proceeding.

Bananas, Cocoa Beans and Green Coffee

No new data was presented for these commodities. We rely exclusively on our previous limited scope finding to justify an exemption on these commodities. The few comments received concerning bananas, cocoa beans, and green coffee urge their exemption. The only concerns expressed were that rates may increase on the movement of green coffee and that car service may be inadequate to meet peak seasonal demand for cocoa bean movement, if these commodities are exempted from regulation. These concerns relate to possible changes in transportation characteristics which might take place in a deregulated environment. They do not constitute reasons for withholding this exemption. We have no indic[a]tion that these things will, in fact, occur. We are optimistic that the exemption will instead produce greater competition for this traffic and rate/service options geared to shipper needs. If these improvements do not come to pass, the railroads will lose more and more of this market. Additional data was presented for the remainder of the commodities. The figures also show a limited nationwide rail market share as discussed below.

Field Dry Peas and Lentils

These commodities are grown exclusively in an area 150 miles long and 40 miles wide through Washington, Oregon, and Idaho. Most peas and lentils are produced by small growers and are sold for export. These export shipments move almost exclusively to nearby ports in Oregon and Washington. The data reveals that the production volumes have increased since 1973, but that the rail transportation of these commodities has steadily decreased. At the same time, reliance on motor carrier and barge service is grow-

ing. Because rail participation in this traffic is declining despite increases in volumes produced and because the distribution pattern of these commodities reflects extremely limited interstate traffic nationwide, we feel that their exemption from regulation is warranted.

Dry Beans

The Department of Transportation (DOT) submitted evidence on the volume of dry beans produced over a six-year period and the tonnages moving by rail. The production figures were based on dry beans sold from farms and were obtained from USDA statistics. The information is questionable because it fails to delineate how much tonnage actually moved in interstate or intrastate commerce. The DOT data shows that rail tonnage of dry beans has declined consistently since 1972, while production shows no clear pattern. Rail tonnage as a function of total production also declined since 1972. These patterns may be more significant than the actual rail transportation/production percentages since the numerator (tons transported by rail) may contain significant double counting. In using the trend, we assume that the degree of double counting remains relatively constant over time.

A similar trend may be observed from supplementary evidence submitted by ORPC, although with a much more modest decline and higher percentage of rail use. ORPC admits, however, that its figures may be inflated, reflecting self-serving statements by rail users.[2]

Finally, data based on our 1-Percent Waybill Sample (Computer Tape) shows that dry beans constituted .033 percent of all farm products moved by rail and .002 percent of all freight moved by rail in 1977. While these percentages do not reflect the heavy reliance of some bean

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[2] The data was obtained from a telephone survey of state commodity commissions or trade associations of bean producers. See supplementary comments of ORPC, filed August 13, 1979, at p.9.

producers on rail service, they are indicative of the limited scope of rail transportation of dry beans in comparison to other farm products and other freight moving by rail.

Although the available evidence is conflicting and not as reliable as we would like, we have determined that eight states throughout the nation apparently produce more than 90 percent of all dry beans available for interstate or intrastate movements. Of these, Michigan, Minnesota, and North Dakota, are heavily dependent on rail for the transportation of beans. These three states account for an average of 40 percent of total production in the United States in the past five years. While this indicates that producers of 40 percent of all bean production heavily utilize rail transportation, fully 60 percent of total bean production moves in a competitive environment where shippers utilize rails and trucks interchangeably.

While we recognize that some dry bean producers rely on rail transportation to a larger extent than producers of other commodities, the fact remains that when total dry bean production is considered, there is evidence of vigorous intermodal competition which replaces the need for reliance on regulation. Further, the Kearney 1 percent sample of shipments moving in 1977 shows that beans are a relatively light loading item moving in shipments of 64 tons per car. This shows that most shipments could be handled in one or two truckloads. No multiple car shipments were noted. Forty-one movements were costed and the average ratio to variable cost was about 97 percent. Rates ranged between 26 and 162 percent of variable cost; these marginal rates do not indicate market power. Therefore, regulation in this situation serves little or no useful public purpose and is not needed to carry out the transportation policy. That policy, among other things, seeks to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices. The existence of sufficient intermodal competition should ensure this result.

It follows that regulation under these conditions is not productive and is an undue burden on the railroads.

Fresh Fish or Other Marine Products, Fresh Mushrooms and Sweet Potatoes

The statistics submitted by DOT show that rail participation in the transportation of these commodities is virtually non-existent (ranging from 0 percent in the case of sweet potatoes to 3.3 percent in the case of other marine products).[3] Furthermore, the comments indicate that fresh fish and mushrooms move primarily by air freight. The rail participation in the transportation of these commodities is even more limited in scope than was the case for fresh fruits and vegetables. We find that rail regulation of these commodities is not necessary to further the transportation policy nor would it be in the public interest, since there is virtually no traffic moving by rail. Moreover, continued regulation in this area constitutes an undue burden on the railroads which should be removed in order to enhance their competitive position. In our view, exemption from regulation will have the salutary effect of allowing rail carriers the flexibility to offer rate and service options that will attract more of this traffic and thereby increase the overall competitive intermodal balance.

Potatoes

Some of the evidence submitted with regard to potatoes indicates a larger rail participation in the movement of these commodities than we have seen for commodities previously discussed. However, as stated in the Sub-No. 1

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[3] Source materials used: DOT's pleading citing to the U.S. Department of Agriculture, Fresh Fruit and Vegetable Unload Totals For 41 Cities (Market News Branch, Washington, D.C.), FVUS-5, 1972-1977 Issues; U.S. Department of Agriculture, Agricultural Statistics 1977 (G.A.O. Washington, D.C., 1977) Table 783 p. 591; and U.S. Department of Transportation, 1 Percent Waybill Statistics, 1972-1977, Computer Tape.

proceeding, evidence of market share is not the only method of meeting the statutory criteria. Other evidence may be considered to show how a particular service or transaction is limited in scope and a showing of *limited market share is not* a prerequisite to granting an exemption.

The evidence regarding potatoes shows limited and declining nationwide rail participation in this traffic. Some major potato-producing states show larger dependence on rail transportation than others, yet most of the representations on behalf of rail users from those states favor nationwide exemption, if potatoes are to be exempted at all. Parties representing the interests of shippers in two of those states, California and Oregon, favor the exemption of potatoes. Statistics submitted by a number of parties indicate that since 1972, rail participation in potato movements nationwide has declined approximately 40 percent,[4] and tonnages originated by rail decreased approximately 54 percent[5] between 1967 and 1977. DOA unload statistics show that the rail percentage of total unloads in 1975 and 1977 was only 19 percent. While these figures are nationwide in scope and do not reflect higher unload figures from some geographic regions, particularly on long-haul movements from the west and midwest to the east (primarily from Idaho and North Dakota) they are indicative of the increasing reliance by shippers on other transportation modes to move potatoes nationwide to the detriment of railroads. Even when considered on a regional basis, the rail market share does not exceed traditional standards[6]

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[4] U.S. Department of Agriculture, *Fresh Fruit and Vegetable Totals For 41 Cities*, 1972-1977.

[5] *Freight Commodity Statistics, Class I Railroads*, Interstate Commerce Commission, Bureau of Accounts, 1967, 1976, 1977, cited by the Association of American Railroads' pleading.

[6] The Commission adopted as a test of a rail carrier's "market dominance" a finding that the carrier transported 70 percent of the relevant

indicating market power and a lack of effective competition. ORPC states that the apparent rail dependence of Idaho and North Dakota for the transportation of potatoes to various destinations may be more illusory than real.[7] The fact that the nationwide railroad market share is relatively small and is declining rapidly indicates the existence of sufficient intermodal competition to supplant the need for regulation. Regulation in this area will not further the transportation policy; neither is it in the public interest as intra- and intermodal competitive forces in this market exist to restrain monopoly pricing and provide alternatives in the event of possible discrimination. Consequently, continued regulation is also an undue burden on the railroads and will not afford them the flexibility which will be necessary to meet the significant and increasing intermodal competition for potato traffic.

Peanuts

The statistical information received regarding peanuts, although limited, indicates that rail participation in peanut movements has remained relatively constant nationwide. The data also reveals that the volumes moving by rail are minimal (428,700 tons in 1977).[8] While those commenting urge continued regulation, we conclude that the evidence, particularly the volume statistics, indicates that rail service

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traffic; Ex Parte No. 320, Special Procedures for Finding Market Dominance, 353 ICC 874 (August 20, 1976) at 898-899. The adoption of this presumption was urged by the U.S. Department of Justice, which maintained that relevant antitrust law indicates that firms with less than 70 percent of a market do not have monopoly power, citing *American Tobacco v. United States*, 328 U.S. 781, 795 (1946) and *United States v. United Shoe Machinery*, 110 F. Supp. 295 (D. Mass. 1953), affirmed *per curiam*, 347 U.S. 521 (1954).

[7] Sheet 18 of the comments of the ORPC, filed May 29, 1979.

[8] From DOT pleading citing to U.S. Department of Transportation, 1 Percent Waybill Statistics, 1972-1977, Computer Tape.

on peanut movements nationwide is limited in scope,[9] and otherwise meets the statutory criteria.

Scope of the Exemption

The issues posed in the Notice of this proceeding all relate to the scope of the exemption. Parties commenting on these issues discussed in general the need for continued regulation in the areas of equipment allocation, loss and damage claims, discriminatory joint-line arrangements and transit times. In addition, the issues of continued antitrust immunity and merger protective conditions were again raised.

All of these matters were thoroughly considered in the context of the first exemption proceeding. There has been no new evidence nor argument presented in this proceeding with the exception of comments by Sunkist. Sunkist alleges that the fresh fruit and vegetable exemption is not working and that increased costs, curtailment of service and equipment shortages have resulted. Sunkist cites contractual problems in the areas of equipment handling, claims, liability, scheduling and payment of charges. If these problems exist, the appropriate remedy is a petition for revocation or modification in the fresh fruit and vegetable proceeding. Certainly unsupported allegations regarding start-up problems with the first exemption should not automatically circumscribe the scope of this exemption proceeding. If problems arise in the context of this exemption, revocation or modification are available remedies.

We conclude that the findings in Ex Parte No. 346 (Sub-No. 1) with respect to these issues are applicable and an exemption from all provisions of Subtitle IV, except for

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[9] The 1 Percent Waybill Sample (Computer Tape) indicates that in 1977, rail participation in interstate peanut movements constituted about .4 percent of the total tonnages of the rail transportation of all farm products nationwide and about .04 percent of the tonnages of all rail freight movements nationwide.

certain informational reporting, is warranted here as well. Retained rules are set forth in the Appendix.

The issue of geographic or product sub-market exclusions was discussed specifically with regard to potatoes and dry beans. Generally, the parties favor a nationwide exemption and oppose the partial exclusion of individual markets, except as noted below.

The Idaho Grower Shippers Association, Inc., and the Idaho Potato Commission submit that any exemption granted for fresh potatoes should exclude fresh potatoes from the state of Idaho, at least for a five-year transitional period. Although rail constitutes the major mode of transportation for fresh potatoes shipped from Idaho, it is admitted by these parties that reliance on rail is rapidly declining. Indeed, the record demonstrates that motor carrier participation in the transportation market of fresh Idaho potatoes is increasing significantly, constituting 7,355 carlot equivalents in 1977 versus 4,069 equivalents in 1973.[10] In addition, reliance on rail is greater during peak seasonal periods and on long-haul movements to distant eastern markets. This distribution pattern reflects the present lack of potato processing plants in proximity to Idaho, a situation subject to change.

In any event, shippers in the remaining potato producing states other than North Dakota rely on motor carriers to transport approximately 70 percent and more of their fresh potato shipments, and shippers from North Dakota, where truck dependence is slightly less, are opposed to the exclusion of that state from a nationwide exemption. Representations concerning dried beans similarly indicate opposition to an exemption limited to geographic areas on movements of that commodity, despite significant rail utilization by bean shippers in certain limited geographic re-

[10] Table 12, verified statement of Dr. Ken Casavant, at p. 60 in the comments of ORPC.

gions. We agree with the majority of the parties that the exemption of each commodity must be nationwide in scope and that this record does not show that exclusion of a particular geographic or product sub-market would be workable.

The comments suggest, in part, that a geographically limited exemption might create more problems than benefits. Railroad rate structures and service provisions might be complicated by movements passing through exempt and non-exempt geographic areas when transporting a particular commodity, burdening the railroads contrary to the established intent of the exemption provision. We are unable to conclude that continued regulation of any geographic or product sub-market of any commodity found exempt from economic regulation under section 10505 in this proceeding is necessary to effectuate the national transportation policy or would be in the public interest.

The last issue to be resolved is the question of the treatment of mixed shipments of exempt and non-exempt commodities. In Ex Parte no. 346 (Sub-No. 1), we determined that mixed carload movements of exempt and regulated commodities would be treated in the same manner as such movements are treated in the motor carrier area. For motor carriers the regulated portion of mixed loads governs treatment of the shipment. See 49 U.S.C. § 10526(a)(6) [formerly section 203(b)(6) of the Interstate Commerce Act]. We now intend to reevaluate that position, both with regard to fresh fruits and vegetables and the miscellaneous commodities in this proceeding.

While the comments discussed this issue in terms of mixed carloads, we believe it is better to treat this issue in terms of mixed shipments. Whether shipments consist of one or more carloads, the same considerations discussed below are applicable.

Shipper comments reveal little interest in this issue. Railroad responses are mixed. Some railroads suggest that

mixed shipments should be regulated. They point out that allowing a mixed shipment to activate exempt status for the shipment would defeat tariffs on otherwise regulated traffic, cause rate quotation problems, and result in endless litigation to resolve different liability provisions for loss and damage on regulated and exempt commodities. Other parties suggest that allowing each portion of a shipment to retain its status as either exempt or regulated would be unworkable, causing increased paper and clerical work in order to prepare separate contracts for each portion of the mixed shipment. One railroad suggests a percentage formula that would invoke regulation of a shipment when 30 percent or more of the shipment is non-exempt. It points out that use of the motor carrier formula could defeat the purposes of the exemptions by mixing a small percentage of regulated commodities with otherwise exempt shipments to invoke Commission regulation. Two railroads suggest total exemption for mixed shipments.

In the Sub-No. 1 proceeding and here, we have stated that these exemptions on rail traffic of limited scope are warranted to give rail carriers maximum flexibility in improving their competitive positions in declining markets. Therefore we must be wary of artificial formulations that could defeat the purposes of exemption by allowing a mixture of minimal portions of regulated commodities with otherwise exempt shipments to reactivate Commission regulation over movements that we have determined require no regulation. Also, we must ensure that any formula for treatment of mixed shipments will not unduly burden rail carriers or shippers so as to encumber the flexibility contemplated by this exemption.

We conclude that regulated commodities moving with exempt commodities should not defeat the exemptions granted in the Sub-No. 1 proceeding and here. We are not convinced that significant problems are likely to occur concerning mixed shipments. Instances of movements of mixed

shipments are not sufficiently widespread to warrant any special rules.

Accordingly, we conclude that any shipment of exempt commodities under section 10505 containing regulated commodities will not cause the shipment to lose its exempt status and reactivate regulatory provisions under Subtitle IV of Title 49 for that shipment.

If problems do develop, any interested party may petition this Commission for reconsideration of the treatment to be accorded mixed shipments. Such petitions will be expected to show with specific supporting data that different treatment of mixed shipments is necessary.

CONCLUSION

We find that the exemption set forth in the Appendix is warranted under 49 U.S.C. § 10505. Nothing in this exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. The exemption shall remain in effect, unless modified or revoked by a subsequent order of this Commission. This decision will not significantly affect the quality of the human environment or conservation of energy resources.

The exemption will take effect on April 10. We have chosen the April 10 effective date to coincide with the opening of the potato season. The transportation of potatoes is the most significant area involved in this proceeding.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum and Alexis.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX

Chapter X of Title 49 of the Code of Federal Regulations is amended by adding a new section, as follows:

§ 1038.10, Miscellaneous Commodities Exemption.

The rail transportation of the commodities listed below is exempt from the provisions of Subtitle IV of Title 49, except that carriers must continue to comply with Commission accounting and reporting requirements, including a brief statement in their annual reports of operations under this exemption, and must maintain copies of rates, charges, rules or regulations, for traffic moved under this exemption, at their principal office, subject to inspection, and send a letter of notification to the docket [Ex. Parte No. 346 (Sub-No. 2)], within 30 days, of the fact that they are using the exemption. The record maintenance requirement will remain in effect for a period of one year, to be extended if necessary. All tariffs pertaining to the transportation of these miscellaneous commodities will no longer apply except to the extent adopted by carrier quotations. The categories of commodities which are exempt under this decision, by Standard Transportation Commodity Code (STCC) number, are:

01 143	Peanuts
01 194	Potatoes, sweet
01 195	Potatoes, other than sweet
01 232	Bananas
01 294	Cocoa beans
01 295	Coffee, green
01 916	Mushrooms, fresh
01 341	Beans, dry ripe
01 342	Peas, dry
01 343	Cowpeas, lentils, or lupines
09 1	Fresh Fish or other Marine Products

and shall embrace all articles assigned additional digits.

The STCC shall be those code numbers in effect as of January 1, 1979, as shown in Standard Transportation Commodity Code Tariff 1-G, ICC STCC 6001-C. Nothing in this exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Commission.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PITTSBURGH TERMINAL CORPORATION	JUDGE ALVIN I. KRENZLER
Plaintiff	Case No. C84-1267
-vs-	ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE SECOND COUNT
THE BALTIMORE AND OHIO RAILROAD, *et al.*,	
Defendants	

This is a stockholder derivative action filed by plaintiff on behalf of the Baltimore & Ohio Railroad Company ("B&O"). Plaintiff's two-count complaint alleges that defendants breached their fiduciary duties to B&O by arranging and approving two transactions: (1) the 1983 sale of B&O's Western Maryland Railway Company ("WMR") stock to C&O at $55 per share; and (2) a contemporaneous agreement between B&O and WMR pursuant to which B&O operates all railroad assets of WMR (the "Operating Agreement").

Pending before the Court in this matter is defendants' motion to dismiss the second count. The second count alleges that the Operating Agreement was unfair to the B&O in various respects and constitutes a disadvantageous financial transaction from B&O's standpoint. It seeks rescission of the Operating Agreement plus rescissory damages.

Defendants contend that the second count should be dismissed for lack of subject matter jurisdiction because Congress has vested in the Interstate Commerce Commission ("ICC") exclusive authority over operating agreements between interstate carriers such as B&O and WMR. Plaintiff has filed a brief in opposition to defendants' motion to dismiss. For the following reasons, the Court con-

curs with the defendants' position that the second count should be dismissed for lack of subject matter jurisdiction.

Railroads engaged in interstate transportation are subject to federal regulation under the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.* *See* 49 U.S.C. §§ 10501. The regulatory scheme of the Interstate Commerce Act is comprehensive and detailed. Without approval of or exemption by the ICC, a railroad subject to the Act may not, among other things, merge with or control the property of another railroad. In particular, § 11343(a)(2) vests jurisdiction in the ICC to approve a contract between carriers permitting one to operate the property of the other:

> (a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I . . ., II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:
>
> * * *
>
> (2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

Furthermore, § 11341(a) provides that "[t]he authority of the Interstate Commerce Commission under this subchapter [49 U.S.C. §§ 11341, *et seq.*] is exclusive."

These sections of the United States Code are part of Section 5 of the Interstate Commerce Act and were formerly codified as 49 U.S.C. § 5(2). The Supreme Court has found that these sections vest in the ICC plenary and exclusive jurisdiction independent of all state or federal authority. *See Schwabacher v. United States*, 344 U.S. 182, 197 (1947) (holding "jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority"); *Thompson v. Texas Mexicana Ry. Co.*, 320 U.S. 134, 146-47 (1946) (stating "§ 5(2) [presently 49 U.S.C. § 11343(a)(1)]

vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired"). *See also Suffin v. Pennsylvania R.R. Co.*, 276 F. Supp. 549 (D. Del. 1967) (holding that Congress, in Section 5(2) of the Interstate Commerce Act, vested exclusive jurisdiction in the ICC over railroad mergers and agreements executed in furtherance thereof).

Plaintiff argues in its brief in opposition to the defendants' motion to dismiss that "transactions which are subject to the ICC's authority under Secs. 11341 and 11343 are those which involve a change in control of a carrier, and not those between carriers already under common control by a parent corporation." Plaintiff's Brief, page 5. The Court agrees that subsections (1), (3), (4), and (5) of § 11343(a) relate to changes in control of a carrier. Subsection (2), however, plainly relates to operating agreements between two carriers, not to a change of control: nothing in the plain language of subsection (2) excludes carriers under the common control of a parent corporation. The cases cited by the plaintiff do not indicate otherwise. To the contrary, when a "change in control" was contemplated as a prerequisite to ICC authority, this requirement was explicitly stated in the statute.

Plaintiff also argues in its brief that "where a railroad transaction has *not* been approved by the ICC under its approval authority, the transaction is subject to challenge under state law." Plaintiff's Brief, page 10. In the instant case, the ICC has not formally considered the Operating Agreement between B&O and WMR. Instead, the ICC issued a "Notice of Exemption" dated April 12, 1983, stating that the Operating Agreement was an exempted transaction under 49 C.F.R. § 1180.2(d)(3),[1] adopted pursuant to authority vested in the ICC by 49 U.S.C. § 10505.

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[1] 49 C.F.R. § 1180.2(d)(3) provides:

Transactions proposed under 49 U.S.C. 11343 involving more than

Contrary to plaintiff's position, the granting of an exemption by the ICC under § 10505 does not result in the relinquishment of the ICC's plenary and exclusive jurisdiction over a transaction—such as the Operating Agreement—with respect to which Congress has vested the ICC with exclusive jurisdiction. Pursuant to § 10505, exemptions are granted by the ICC based upon affirmative statutory findings. This exemption process mandates a considered and deliberate use of Commission authority and depends on the exercise of such authority for its validity. As concluded by the ICC in *Consolidated Rail Corporation—Declaratory Order—Exemption*, decided February 27, 1986:

> The Commission does not lose jurisdiction over a matter that it has exempted from its regulation pursuant to 49 U.S.C. 10505. No common law rights or remedies are revived by virtue of the exemption. The only recourse available to a person aggrieved with respect to a matter that has been exempted under Section 10505 is to petition for partial or complete revocation of the exemption under 49 U.S.C. 10505(d).

Id. at page 7. *See also Exemption of Railroads from Securities Regulation Under 49 U.S.C. 11301*, December 27, 1985 (ICC holding that a section 10505 exemption does

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one common carrier by railroad are of four types: *Major*, *significant*, *minor*, and *exempt*.

* * *

(d) A transaction is *exempt* if it is within one of the seven categories described below. . . .

* * *

(3) Transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance and carriers outside the corporate family.

not result in the Commission relinquishing this jurisdiction).

In accordance with the foregoing, the Court grants defendants' motion to dismiss the second count of the complaint, pursuant to Fed. R. Civ. P. 12(b)(1). The fairness or unfairness of the terms of the Operating Agreement is not, in the first instance, a matter for this Court's jurisdiction or concern. This matter is committed to the exclusive authority of the ICC. §§ 11341, 11343(a)(2).

The ICC publishes a notice in the Federal Register within 30 days of the filing of the notice of exemption. If a person aggrieved with respect to an exempted transaction demonstrates that the notice of exemption contains false or misleading information, the Commission "shall summarily revoke the exemption for that carrier and require divestiture." 49 C.F.R. § 1180.4(g)(l)(ii). Furthermore, a person aggrieved with respect to a matter that has been exempted under 49 U.S.C. § 10505 may petition for partial or complete revocation of the exemption under 49 U.S.C. § 10505(d). ICC action in this area then is subject to review by the Court of Appeals, pursuant to 28 U.S.C. § 2321.

IT IS SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

STATUTORY PROVISIONS INVOLVED

In addition to the provisions set out in the Petition ("Pet.") at 2-5, the following statutory provisions are involved in this case:

[49 U.S.C.] § 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount

necessary to maintain the rail system and to attract capital;

* * *

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation; [and]

* * *

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination[.]

[49 U.S.C.] § 10501. General jurisdiction

* * *

(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

[49 U.S.C.] § 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of

persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

* * *